IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

G. W. BURLEY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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In the

United States Circuit Court of Appeals

For the Seventh Circuit

No. 8249

G. W. BURLEY, ET AL.,
Plaintiffs-Appellants,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,
Defendant-Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

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1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable John P. Barnes, District Judge of the United States for the Northern District of Illinois on Twentieth day of February, in the year of our Lord one thousand nine hundred and Forty-One, being one of the days of the regular February Term of said Court, begun Monday, the Third day of February, and of our Independence the 165th year. Placita.

Present:

Honorable John P. Barnes, District Judge.
William H. McDonnell, U. S. Marshal.
Hoyt King, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

Harry M. Alderman, F. E. Beccue, W. R. Bramer, G. W. Burley, J. E. Challender, Christine L. S., Paul Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, M. Kusner, P. F. McNamara, R. L. Miller, T. J. Murray, J. C. Newman, Edward R. Nolan, G. T. Priest, B. F. Smith, W. G. Smith, M. F. Starkweather, L. Strodtbeck, Ernest Thompson, Malcolm L. Young, H. A. Schroeder,

vs.

Elgin, Joliet and Eastern Railway Company, an Illinois Corporation.

No. 2341.

Be It Remembered, that the above-entitled action was commenced by the filing of the following Complaint in the above-entitled cause, in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the Nineteenth day of November, A. D. 1940.

3 IN THE DISTRICT COURT OF THE UNITED STATES, Filed Nov. 19, 1940.

Northern District of Illinois,

Eastern Division.

Harry M. Alderman, F. E. Beccue, W. R. Bramer, G. W. Burley, J. E. Challender, Christine L. S., Paul Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, M. Kusner, P. F. McNamara, R. L. Miller, T. J. Murray, J. C. Newman, Edward R. Nolan, G. T. Priest, B. F. Smith, W. G. Smith, M. F. Starkweather, L. Strodtbeck, Ernest Thompson, Malcolm L. Young, H. A. Schroeder,
Plaintiffs,

vs.

Elgin, Joliet and Eastern Railway Company, an Illinois Corporation,
Defendant.

Civil Action No. 2341.
Jury Requested.

COMPLAINT.

To the Honorable Judge of the District Court of the United States, in and for the Northern District of Illinois, Eastern Division:

Plaintiffs allege:

1. That more than one half of the plaintiffs herein are citizens of the State of Indiana and the defendant herein is a corporation incorporated under the laws of the State of Illinois. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

2. That on or about July 27, A. D. 1934 and subsequent thereto, they entered the employment of the defendant, under a written contract of employment, the original of which will be produced at the trial hereof, which had previously been obtained by the Brotherhood of Railroad
4 Trainmen under date of April 1, 1927. Said contract among other things contains Article 6 which is in words and figures as follows:

"(A) Regularly assigned yard crews will each have a fixed starting time and the starting time of a crew will not be changed without at least forty-eight (48) hours advance notice. Present practice as to the handling of transfer crews is not affected by the foregoing.

No yardman will be required to work more than one (1) assigned period in any twenty-four (24) consecutive hours.

(B) Yard crews shall have a designated point for going on duty, and a designated point for going off duty.

Starting time of yard crews on one, two or three 8-hour shifts will be as follows:

7 a. m., 8 a. m. and 8:30 a. m.

3 p. m. and 4 p. m.

11 p. m., 12 midnight, and 12:30 a. m.

except in hot metal and cinder, coke oven, Buffington and Waukegan districts, in one, two or three shifts, starting time will be 6:30 a. m., 7 a. m., 7:30 a. m., and 8 a. m.; 2:30 p. m., 3 p. m., 3:30 p. m., and 4 p. m.; and 10:30 p. m., 11 p. m., 11:30 p. m., and 12 o'clock midnight.

Starting time for Stockton engines will be 6:30 a. m., 1:30 p. m. and 8:30 p. m.

Starting time for yard crews handling ore at South Chicago will be 6 a. m. and 1 p. m.

Starting time for yard crews handling coal and ore at Gary will be 6 a. m. and 1 p. m.

Starting time for yard crews assigned to coal loading and unloading at East Joliet will be 6:30 a. m.

Whenever two standards of time are established, starting time may be changed one hour from period above provided."

3) That therein and thereby the defendant agreed with plaintiffs herein to observe definite starting times for the crews of which plaintiffs were then members. That said plaintiffs on July 27, 1934, and continuously from that date to November 15, 1938, were members of the Brotherhood of Railroad Trainmen.

5 4) That the authorized officials of said plaintiffs, for and on their behalf verbally agreed to suspend the operation of said scheduled Article 6 of said agreement as aforesaid, for a period of thirty days only, to enable the industry to become adjusted to the new schedule; i. e. until August 26, 1934, at which date said article as to starting time was to go into effect. To which the plaintiffs, and the

defendant by and through its duly constituted officials agreed.

5) That contrary to said agreement and the contract of employment as aforesaid, said defendant on August 26, 1934, refused, and continuously to and including November 14, 1938 has refused to abide by the terms thereof.

6) That your plaintiffs and each of them have at all times been ready, willing and able to perform, and have performed their part of said agreement, insofar as they were able, and have at various and sundry times since August 26, 1934, made demand upon the defendant to perform the terms thereof, as required by said agreement aforesaid.

7) That the plaintiffs herein have duly performed the other terms of said contract in and about the settlement of the plaintiffs' controversy with the defendant; they did confer and lodge protests with the various officials of the defendant including the local officials, General Superintendent and the Vice President, as required by Article 25 of said agreement which is as follows:

"Any controversy arising as to the application of the rules herein agreed upon to the Schedule shall be taken up by the local committee and the local officials. In the event of failure on their part to agree upon a satisfactory basis of settlement, the General Committee may take up the question with the General Superintendent, and in the event of their failure to agree upon a satisfactory settlement, the Committee may appeal to the Vice President."

But that said plaintiffs have, to the date hereof, been unsuccessful in arriving at any settlement of their claims.

6 8) That under the terms of said agreement aforesaid, each of the plaintiffs herein are entitled to pay for an additional day, at time and one-half, at the regular daily rate from August 26, 1934, to and including November, 14, 1938, for each foreman and each helper, for each day they were required to work in yard service in the "Whiting Yard" of defendant, in accordance with the established practice among railroads and employees thereof, and as provided in said Article 6 of said agreement as aforesaid.

9) That by reason of the violation of said agreement as aforesaid by the defendant, the approximate following amounts with interest thereon at five percent (5%) per

annum from the date due until paid, are owed plaintiffs by defendant as follows:

Harry M. Alderman	$ 4,200.00
F. E. Beccue	6,000.00
W. R. Bramer	14,000.00
G. W. Burley	7,000.00
J. E. Challender	4,500.00
L. S. Christine	7,000.00
Paul Garvey	14,000.00
J. M. Harr	3,000.00
A. T. Hatfield	7,000.00
R. P. Jones	6,974.00
M. Kusner	7,000.00
P. F. McNamara	4,800.00
R. L. Miller	7,000.00
T. J. Murray	4,000.00
J. C. Newman	6,000.00
Edward R. Nolan	4,500.00
G. T. Priest	9,000.00
B. F. Smith	6,000.00
W. G. Smith	4,000.00
M. F. Starkweather	4,250.00
L. Strodtbeck	10,000.00
Ernest Thompson	7,000.00
Malcolm H. Young	3,000.00
H. A. Schroeder	6,000.00

Wherefore plaintiffs individually hereby demand judgment against the defendant for the above sums of money set opposite their respective names as aforesaid, with interest thereon from the due date thereof, until paid, and costs of this suit.

John H. Gately,
Attorney for Plaintiffs.

9 And on, to wit, the 19th day of November, 1940, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Security for Costs in words and figures following, to wit: Filed Nov. 19, 1940.

10 DISTRICT COURT OF THE UNITED STATES.
* * (Caption—2341) * *

It enter itself as security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this Court; and in default of payment by the Plaintiffs of any cost ordered or adjudged to be paid by Plaintiffs hereby agree and stipulate that execution may issue against our property for all costs not exceeding two hundred dollars taxed against Plaintiffs.

Dated this 15th day of November, A. D. 1940.

United States Fidelity and Guaranty Company, a Maryland Corporation,
By Edmond J. Moroney,
Attorney-in-Fact (Seal)

Acknowledged before me this ..... day of ....., 19.....

.....
Clerk.

Certificate as to Attorney-in-Fact hereto attached not copied.

(Endorsed) District Court of the United States * * (Caption—2341) * * Summons in Civil Action Returnable not later than 20 days after service. Filed Nov. 27, 1940 Hoyt King, Clerk John H. Gately, Attorney for Plaintiff.

Marshal's Return.

Served this writ, together with copy of the Complaint, on the within named Elgin, Joliet & Eastern Railway Company, an Illinois corporation, by delivering copies thereof to H. I. Allen, Attorney, an agent of said corporation, this

22nd day of November, A. D. 1940. The President of said corporation not found in my district.

William H. McDonnell,
United States Marshal,
By Wm. Raff,
Deputy.

Marshal's Fees		
1	Service	$2.00
1	Miles	.06
	Total.....	$2.06

Filed Nov. 27, 1940.

7 And on, to wit, the 27th day of November, 1940, there was filed in the Clerk's office of said Court a certain Summons with Return of U. S. Marshal endorsed thereon in words and figures following, to wit:

8 DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2341) * *

SUMMONS.

To the above named Defendant:

You are hereby summoned and required to serve upon John H. Gately, plaintiff's attorney, whose address 134 South LaSalle St., Chicago, Illinois, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Hoyt King,
Clerk of Court.
By Ann G. Joyce,
Deputy Clerk.

(Seal)

Date: November 19, 1940.

(Endorsed) District Court of the United States * * (Caption—2341) * * Security for Costs Filed Nov 19 1940 at 1 o'clock P. M. Hoyt King, Clerk John H. Gately, Atty.

11 And on, to wit, the 10th day of December, 1940, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion to Dismiss in words and figures following, to wit: Filed Dec. 10, 1940.

12 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—2341) * *

MOTION TO DISMISS.

Elgin, Joliet and Eastern Railway Company, defendant in the foregoing entitled case, by Harry I. Allen and Paul R. Conaghan, its attorneys, hereby moves that the complaint herein be dismissed for the reasons that (a) this Court lacks jurisdiction over the subject matter and (b) the plaintiffs have failed to state a claim upon which relief can be granted.

As a basis for this motion the defendant states:

1. The plaintiffs, on July 27, 1934, and since that date continuously until the date hereof, were members of the Brotherhood of Railroad Trainmen, a labor organization. On October 31, 1938, the Brotherhood of Railroad Trainmen entered into a written compromise agreement with the defendant relating in part to the dispute regarding the starting time during the period beginning July 27, 1934, and continuing until the date of said compromise agreement, for yardmen, including the plaintiffs, in the Standard Oil Company switching yard at Whiting, Indiana (referred to in the complaint as the "Whiting Yard"); that said agreement provided, inter alia, that
13 the settlement's set forth therein should be "a complete settlement" of all claims relating to the starting time of yardmen, including the plaintiffs, in the Standard Oil Company switching yard at Whiting, Indiana, and also, that "no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement."

2. The Brotherhood of Railroad Trainmen was selected by the plaintiffs as their representative to present to the officials of the defendant and to compromise the claims of the plaintiffs resulting from the interpretation or application of Article 6 of the agreement of the defendant with its yardmen concerning rates of pay, rules

and working conditions as applicable to yardmen employed in the Standard Oil Company switching yard at Whiting, Indiana. By the provisions of the said compromise agreement executed on October 31, 1938, the Brotherhood of Railroad Trainmen released all claims of the plaintiffs against the defendant arising out of the alleged violation of Article 6 of the agreement of the defendant with its yardmen.

3. The Brotherhood of Railroad Trainmen was selected by the plaintiffs as their representative to present to the National Railroad Adjustment Board the claims of the plaintiffs resulting from the interpretation or application of Article 6 of the agreement of the defendant with its yardmen concerning rates of pay, rules and working conditions as applicable to yardmen employed in the Standard Oil Company switching yard at Whiting, Indiana. The dispute was referred by the Brotherhood of Railroad Trainmen, as the representative of the plaintiffs, and by the defendant to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data relating to the dispute. On September 6, 1940, the National Railroad Adjustment Board, by order of the First Division, found that it had "jurisdiction over the dispute involved herein. The parties to said dis-
14 pute were given due notice of hearing thereon. The evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28, 1938, accepted by employees October 31, 1938" and, in accordance with the provisions of the Railway Labor Act, entered an award "Claim denied per Findings." In accordance with the provisions of the Railway Labor Act, the said award is final and binding upon both parties to the dispute.

And in support of this motion and of the facts stated herein as basis for this motion, there is attached hereto the affidavit of T. E. Bond, Vice President of the defendant.

Harry I. Allen,
Paul R. Conaghan,
Attorneys for Elgin, Joliet and Eastern Railway Company, a corporation,
208 South LaSalle Street,
Chicago, Illinois.

15 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

Harry M. Alderman, F. E. Beccue, W. R. Bramer, G. W. Burley, J. E. Challender, Christine L. S., Paul Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, M. Kusner, P. F. McNamara, R. L. Miller, T. J. Murray, J. C. Newman, Edward R. Nolan, G. T. Priest, B. F. Smith, W. G. Smith, M. F. Starkweather, L. Strodtbeck, Ernest Thompson, Malcolm L. Young, H. A. Schroeder, *Plaintiffs,* *vs.* Elgin, Joliet and Eastern Railway Company, an Illinois corporation, *Defendant.*	Civil Action. No. 2341.

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS.

State of Illinois, } ss.
County of Cook. }

T. E. Bond, being first duly sworn, on oath deposes and says that he is Vice President of Elgin, Joliet and Eastern Railway Company, a corporation, defendant herein; that he makes this affidavit for the purpose of supporting the motion hereto annexed to dismiss the complaint filed herein; that Exhibit "A" hereto attached is a photostatic copy of the complaint filed by the Brotherhood of Railroad Trainmen against the defendant before the National Railroad Adjustment Board on November 23, 1936, relating to the alleged violation of Article 6 of the agreement between the defendant and its yardmen, working daily since July 27, 1934, in the Standard Oil Company switching yard at Whiting, Indiana; that Exhibit "B" attached hereto is a photostatic copy of the letter of the Adjustment Board, dated November 23, 1936, assigning Docket

No. 3537 to the complaint relating to the starting
16 time of yardmen in the Standard Oil Company switching yard at Whiting, Indiana; that Exhibit "C" attached hereto is a photostatic copy of a letter of the President of the defendant, addressed to the General Chairman of the Brotherhood of Railroad Trainmen, dated October 28, 1938, and referring to a compromise settlement of cases and grievances relating to the interpretation or application of agreements of the defendant with its employees concerning rates of pay, rules and working conditions, including Case No. 5 (Docket 3537) then pending before the Adjustment Board; that said offers of settlement set forth in the letter dated October 28, 1938, were accepted in writing by the General Chairman and Secretary of the Brotherhood of Railroad Trainmen on October 31, 1938, as set forth on page 8 of said compromise settlement; that Exhibit "D" attached hereto is a photostatic copy of a joint letter of the defendant and the General Chairman of the Brotherhood of Railroad Trainmen to the Adjustment Board, dated October 31, 1938, advising the Board of the settlement of cases, including Docket 3537, the complaint of the employees relating to starting time of yardmen in the Standard Oil Company switching yard at Whiting, Indiana; that Exhibit "E" attached hereto is a photostatic copy of a letter from the Board to the President of the defendant, dated October 31, 1938, removing case No. 3537 from the docket of the Adjustment Board; that Exhibit "F" attached hereto is a copy of the award in Docket No. 7324 of the National Railroad Adjustment Board First Division, dated September 6, 1940, relating to a second complaint regarding the starting time of yardmen in the Standard Oil Company switching yard at Whiting, Indiana, which second complaint was filed with the Board by the Brotherhood of Railroad Trainmen on May 18, 1939.

T. E. Bond.

Subscribed and Sworn to before me this 11th day of December, 1940.

Daniel J. O'Connell,
(Seal) *Notary Public.*

17 **EXHIBIT "A".**

BEFORE NATIONAL RAILROAD ADJUSTMENT BOARD

Division Number One

Brotherhood of Railroad Trainmen, versus
Elgin, Joliet & Eastern Railway Company.
Case No. 5.

Statement of Claim:

Complaint of the Brotherhood of Railroad Trainmen against the Elgin, Joliet & Eastern Railway Company, who contracted the work in industrial switching for the Standard Oil Company in their Whiting, Indiana, Plant and placed the employees under the agreement of the yardmen of the Elgin, Joliet & Eastern Railway Company, but failed to put into effect the starting time of yard crews as provided for in the agreement due to making arrangements with the Engineer's Committees that they would be privileged to start the crews at the time that such crews were started while the switching was being done by the Standard Oil Company crews.

The contention of the Elgin, Joliet & Eastern Railway Company being that the Standard Oil Company cannot be serviced without having the engines starting in yard service at such times as the former custom.

The contention of the Committee for the Brotherhood of Railroad Trainmen being that larger and greater concerns with more complicated service are being and have been handled for a great many years with the continuity of service as outlined in the agreement with three shifted engines in yard service. We do not understand that it is the carrier's right to establish an irregular starting time in the Whiting Yard in violation of the agreement between them and the yardmen because of the fact that the Engineers are willing that such be done.

We respectfully request oral argument on Paragraph (B) of Article 6, reading in part as follows:

"Yard crews shall have a designated point for going on duty, and a designated point for going off duty. Starting time of yard crews one, two or three 8 hour shifts will be as follows: 7:00 A. M. 8:00 A. M. 8:30 A. M. 3:00

P. M. and 4:00 P. M. 11:30 P. M. 12:00 midnight, and 12:30 A. M." No exceptions for engines in this class of service.

Yours truly,
C. H. Williams,
General Chairman-BRT-EJ&E System.

18 EXHIBIT "B".

(Letterhead of National Railroad Adjustment Board.)

November 23, 1936.

Mr. S. M. Rogers, President
Elgin, Joliet & Eastern Railway Company
Chicago, Illinois

Mr. A. F. Whitney, President
Brotherhood of Railroad Trainmen
Cleveland, Ohio

Gentlemen:

Our Docket Numbers 3533 to 3543, inclusive, have been assigned as indicated to the following Elgin, Joliet & Eastern Railway Company—Trainmen's cases, which were submitted ex-parte at the instance of General Chairman Williams, representing the Brotherhood of Railroad Trainmen on that railroad:

3533—"Complaint against the Elgin, Joliet & Eastern Railway Company for failure to comply with their agreement with train and yardmen, using the Carnegie-Illinois Steel Corporation's ownership or operation of certain Plants as a subterfuge."

3534—"Complaint against the Elgin, Joliet & Eastern Railway Company for permitting their Yardmasters and Assistant Yardmasters to perform service as yardmen in their yards depriving yardmen of work covered in Article 3 of the agreement."

3535—"Violation of the Agreement in starting yard crews as transfers, who do yard switching, in violation of the established starting time."

3536—"Protest against contracting the hauling of cinders out of the South Chicago Yard and permitting the Pullman Railroad to enter that yard and take cars out of that yard in violation of Article 3 of the Agreement."

3537—"Protest against starting yard engines in the

Whiting, Indiana yard, (Standard Oil Company Plant) in violation of Article 6 of the agreement."

19 3538—"Protest against the use of self propelled cranes owned by the Carnegie-Illinois Steel Corporation to weigh cars in the South Chicago Yard in violation of the agreement."

3539—"Time claim of Yardman W. E. Bertholf, South Chicago Yard for being deprived of work account the Elgin, Joliet & Eastern Railway Company permitting the work to be done by self propelled cranes."

3540—"Time claim of T. Schweir, South Chicago Yard, for being deprived of work account the Elgin, Joliet & Eastern Railway Company permitting work to be done by self-propelled cranes."

3541—"Time claim of H. Linne, South Chicago Yard, for being deprived of work account the Elgin, Joliet & Eastern Railway Company permitting the work to be done by self-propelled cranes."

3542—"Claim of W. O. Wilton for payment of time lost, account dismissed from the service for alleged violation of Rule "G" without a proper investigation under the provisions of Article 18 of the Agreement."

3543—"Claim of Brakeman J. H. Kimberlin, Gary Division, for pay for all time lost when unjustly dismissed from the service for responsibility in a head end collision between Train No. 6 and Extra 702, East, at Hartsdale, Indiana, January 11, 1936."

These cases are assumed to be complete and nothing will be added to them prior to the date of the hearing thereof; however, at the direction of the Board we are sending to the Management copies of the Employees' submissions, and to the General Chairman, with copy of this letter, copies of the Management's submissions.

This is being done in order that both the Management and the Committee may have an opportunity to study the submissions prior to the date set for hearings, information as to which will be given to you later.

It should be understood, however, that any argument presented to the Board at the hearing should be confined to matters incorporated in the submissions.

Yours very truly,

T. S. McFarland,
Secretary.

TSM:WB
Enc.
cc: Mr. C. H. Williams

EXHIBIT "C".

(Letterhead of Elgin, Joliet and Eastern Railway Co.)

October 28th, 1938.

Mr. C. H. Williams,
Gen. Chairman, Brotherhood of Railroad Trainmen,
603 Jackson Street,
Joliet, Illinois.

Dear Sir:

Since my letter of August 18th in which I tentatively proposed settlement of certain matters of grievance we have had further correspondence and conferences which have modified our decision in some cases. Therefore, in order that the whole matter be placed in concrete form I am outlining below our proposals to settle all of the cases except as otherwise specified.

Case No. 1—Labor Board Docket #3533—Handling of railroad cars by cranes or other forms of power.

Settled with respect to South Chicago and Joliet by agreements. Said agreements provide that the use of cranes in the handling of railroad equipment is restricted to certain movements set forth specifically in said agreements, coupled with the proviso that all work not so specifically allocated to cranes (or other forms of power) is considered yard work as defined in Article 3 of the Yardmen's Agreement, and will be handled as provided for in said agreement. It is further understood and agreed that in the event similar situations obtain in other yards where tracks are owned by the Elgin, Joliet and Eastern Railway Company that efforts will be made to arrive at a mutually satisfactory agreement respecting the movement in such yards.

Case No. 2—Labor Board Docket #3534—Work of Yardmasters and Assistant Yardmasters.

Settled by the issuance of instructions to the effect that Yardmasters at South Chicago, Joliet Mill Yard, Whiting, (S. O. Yard), Kirk Yard and Mill Yard at Gary, and Waukegan Yard will cease and desist performing work of Yardmen in compliance with Order No. 22839 of the Illinois Commerce Commission dated January 1st, 1935.

Case No. 3—Labor Board Docket #3535—Starting time of transfer engines.

It is agreed that for the future transfer engines starting

at times other than those specified in Article 6 Yardmen's Agreement will not be used in general yard work.

21 Case No. 4—Labor Board Docket #3536—Delivery of cars to Pullman Railroad in South Chicago Yard.

It is understood and agreed that this case now pending before the Labor Board will be left with that body for adjudication.

Case No. 5—Labor Board Docket #3537—Starting time of switch engines in Whiting S. O. Yard.

Settled by agreement that the starting times for a ninety day trial period commencing November 15th, 1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employees claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in satisfaction to our employees and to the industry served, then representatives of the Railway Company and representatives of the Yardmen, and representatives of the Engineers and representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry.

Case No. 6—Labor Board Docket #3538—Weighing of pig iron with cranes in South Chicago Yard.

Settled by agreement between Elgin, Joliet and Eastern Railway Co., and its Yardmen restricting movement of railroad cars by cranes in this yard.

Case No. 7—Labor Board Docket #3723—Handling of water car by cranes in South Chicago Yard.

Settled by specific proviso in agreement covering the movement of cars by cranes in this yard.

Case No. 8—Labor Board Docket #3539—Time claim.

Settled by agreement to pay Mr. W. E. Bertholf Eight Dollars and Three Cents ($8.03).

Case No. 9—Labor Board Docket #3540—Time claim.

Settled by agreement to pay Mr. T. Schweir Eight Dollars and Three Cents ($8.03).

Case No. 9-A—Not before Labor Board. Furnishing electric lanterns to Indiana employees.

The Company to furnish electric lanterns to Indiana train and yardmen on same terms as now furnished

22 train and yardmen in Illinois. Mr. Williams to withdraw his request that bulbs and batteries for said lanterns be placed on cabooses in both Illinois and Indiana.

Case No. 10—Labor Board Docket #3541—Time claim.
Settled by agreement to pay to Mr. H. Linne Eight Dollars and Three Cents ($8.03).

Case No. 11—Labor Board Docket #3542—Time claim.
Settled by agreement to pay Mr. W. O. Wilton Three Hundred Twenty-nine Dollars and Seventy-three Cents ($329.73).

Case No. 13—Labor Board Docket #3510—Time Claim account change in starting time of engine at Whiting (S. O. Yard).
Settled by agreement to pay—
Mr. F. A. Emerson, Eight Dollars and Three Cents ($8.03);
Mr. M. Barsich, Seven Dollars and Forty-five Cents ($7.45);
Mr. S. H. Shearer, Seven Dollars and Forty-five Cents ($7.45).

Case No. 14—Labor Board Docket #3509—Time claim account alleged run around.
Settled on basis presented but without establishing any precedent, the following amounts will be paid.
Mr. J. W. Hoover, Six Dollars and Two Cents ($6.02);
Mr. H. Bogart, Five Dollars and Two Cents ($5.02);
Mr. C. Mackin, Five Dollars and Two Cents ($5.02).

Case No. 15—Labor Board Docket #3508—Time claim for handling switches at Dyer.
Settled by agreement to pay Mr. P. E. Miles Seven Dollars and Thirty-three Cents ($7.33).

Case No. 16—Labor Board Docket #3511—Handling of empty cars from Kirk Yard by Gary Mill Yard crew.
Settled by agreeing to pay—
Mr. L. E. Clement, Eight Dollars and Three Cents ($8.03);
Mr. P. Carr, Seven Dollars and Forty-five Cents ($7.45);
Mr. W. Brown, Seven Dollars and Forty-five Cents ($7.45).
It is further agreed that Gary Mill Yard engines will not be permitted to go into Kirk Yard for the purpose of taking back loaded cars or empty cars for loading.

Case No. 17—Labor Board Docket #3543—Time claim account discipline imposed as result of an accident.
Settled by agreement to pay Mr. John Kimberlin, Nine Hundred Fifty-one Dollars and Thirty Cents ($951.30).

23 Case No. 20—Revision of grade in Yard "A", East Joliet.

Settled by agreement to change grade of tracks in Yard "A", East Joliet, at such times when it is necessary to do other work on these tracks.

Case No. 21—Handling of cars by cranes at East Joliet.

Settled by agreement specifically providing the movements which may be made by cranes in this yard.

Case No. 23—Time claim account brakeman held in to act as conductor.

Settled by agreement to pay Mr. L. C. Talley the amount of claim filed—Six Dollars and Thirty Cents ($6.30)—and further agreed that in such future cases the man so held in will be paid not less than the amount he would have received on his regular assignment.

Case No. 24—Handling of locomotives between roundhouse and wye at East Joliet.

Settled by agreement to pay time claims as listed below, and subscribing to the understanding that in future cases of this kind when two locomotives are moved at a time one yardman, who will receive foreman's pay, will be used. If more than two locomotives are so handled a full crew will be used.

Mr. E. R. Smith, Eight Dollars and Three Cents ($8.03);

Mr. M. Brogan, Four Dollars and Sixty-eight Cents ($4.68);

Mr. D. H. Allen, Eight Dollars and Three Cents ($8.03);

Mr. G. Stickel, Four Dollars and Ten Cents ($4.10);

Mr. J. E. McNamara, Four Dollars and Ten Cents ($4.10);

Mr. F. Kremek, Fifty-eight Cents (58¢);

Mr. C. Osman, Twenty-two Dollars and Thirty-four Cents ($22.34);

Mr. F. Jones, Seven Dollars and Forty-five Cents ($7.45);

Mr. W. Limebeck, Fourteen Dollars and Ninety Cents ($14.90);

Mr. W. A. Swinke, Seven Dollars and Forty-five Cents ($7.45);

Mr. C. Allen, Fourteen Dollars and Ninety Cents ($14.90);

Mr. R. Rish, Fourteen Dollars and Ninety Cents ($14.90);

Mr. G. Meifert, Fourteen Dollars and Ninety Cents ($14.90);

Mr. G. Talley, Seven Dollars and Forty-five Cents ($7.45);

Mr. E. Nealis, Seven Dollars and Forty-five Cents ($7.45);
Mr. C. J. Pike, Twenty-nine Dollars and Seventy-nine Cents ($29.79);
Mr. D. W. Reed, Seven Dollars and Forty-five Cents ($7.45);
Mr. J. L. Elens, Fourteen Dollars and Ninety Cents ($14.90);
Mr. C. Z. Cooper, Seven Dollars and Forty-five Cents ($7.45);
Mr. A. Hedlund, Fourteen Dollars and Ninety Cents ($14.90);
Mr. J. J. Shroba, Twenty-two Dollars and Thirty-four Cents ($22.34);
Mr. J. Dutka, Seven Dollars and Forty-five Cents ($7.45);
Mr. V. A. Newell, Fourteen Dollars and Ninety Cents ($14.90);
Mr. L. Simon, Seven Dollars and Forty-five Cents ($7.45);
Mr. R. Cheney, Twenty-two Dollars and Thirty-four Cents ($22.34);
Mr. R. Pike, Twenty-two Dollars and Thirty-four Cents ($22.34);
Mr. W. J. Carlson, Seven Dollars and Forty-five Cents ($7.45);
Mr. C. F. Stoner, Seven Dollars and Forty-five Cents ($7.45);
Mr. P. H. Kane, Fourteen Dollars and Ninety Cents ($14.90).

Case No. 36—Handling engines between Roundhouse and Machine Shop at East Joliet.

Settled by agreement to pay—
Mr. F. R. Wagner, Eight Dollars and Three Cents ($8.03);
Mr. R. Pike, Seven Dollars and Forty-five Cents ($7.45);
Mr. L. Kuhazda, Seven Dollars and Forty-five Cents ($7.45).

Case No. 38—Time claim account yardman working one shift as Assistant Yardmaster and another shift as Yardman during one twenty-four hour period.

Settled by agreeing to pay Mr. H. A. Edwards, Eight Dollars and Fifty-three Cents ($8.53), and with the understanding that, when men are available, yardmen will not be permitted to work more than one shift in any twenty-four hours, and with the further understanding that this means

that a yardman may not work one shift as yardman and another shift as an Assistant Yardmaster (or Yardmaster) in the same twenty-four hours.

Case No. 39—Time claim.

Settlement by agreement to pay—

Mr. A. Holem, Eight Dollars and Fifty-three Cents ($8.53);

Mr. J. B. Massey, Seven Dollars and Ninety-four Cents ($7.94);

Mr. G. A. Hamil, Seven Dollars and Ninety-four Cents ($7.94).

Case No. 40—Time claim.

Settled by agreement to pay—

Mr. F. Rusinski, Eight Dollars and Fifty-three Cents ($8.53);

Mr. G. A. Sidebottom, Seven Dollars and Ninety-four Cents ($7.94);

Mr. H. O'Neil, Seven Dollars and Ninety-four Cents ($7.94).

Case No. 41—Time claim.

Settled by agreement to pay—

Mr. C. S. Wells, Eight Dollars and Fifty-three Cents ($8.53);

Mr. J. V. Golden, Seven Dollars and Ninety-four Cents ($7.94);

Mr. J. E. Clavin, Seven Dollars and Ninety-four Cents ($7.94).

25 Case No. 42—Time claim account failure to notify brakeman of return of conductor to his assignment.

This case involves the failure to notify Brakeman P. E. Miles of the return of regular Conductor for whom Mr. Miles had been substituting at his assignment. Failure to notify Mr. Miles was due to inability to reach him account station employees not having his address. However, without establishing any precedent, case is settled by agreement to pay Mr. Miles Nine Dollars and Seventy-one Cents ($9.71).

Case No. 43—Handling of cars by cranes in Whiting (S. O. Yard). Time claim of Mr. H. M. Alderman, Mr. J. M. Harr and Mr. F. A. Douglas.

Inasmuch as we have no control over the situation we cannot allow these claims.

Case No. 44—Time claim.

This claim involves the displacement of Yard Foreman Hyde on a west side engine at Gary when force was reduced.

Claim predicated on the fact that a certain Assistant Yardmaster was retained in that capacity while an older yardman who had been serving as Assistant Yardmaster was reduced. Disposed of by agreeing to pay Mr. L. A. Hyde Twelve Dollars and Eighty-seven Cents ($12.87), representing the difference between what he actually earned as helper and what he would have earned as foreman of engine.

Instructions have been issued which will eliminate the practice complained of, which is the basis for this claim.

Case No. 45—Time claim of Yardmen J. Harr and F. A. Douglas, account cranes handling cars in Whiting (S. O. Yard).

Inasmuch as we have no control over the situation we cannot allow these claims.

Cases Nos. 46, 47 and 48—All Personal Injury Claims.

These cases have been closed as per your letter of August 27th, 1938.

Case No. 50—Time claim of Yardmen H. Alderman, F. A. Douglas and T. J. Murray, account cranes handling cars in Whiting (S. O. Yard).

Inasmuch as we have no control over the situation we cannot allow these claims.

Cases Nos. 52 and 53—Handling of cars by dinkey engines in Whiting (S. O. Yard).

We have not been presented with specific time claims covering these cases but understand they are similar to the claims filed under cases Nos. 43, 45 and 50. If so, the same conditions obtain and we would be unable to allow such claims if they were presented.

26 Case No. 54—Personal injury claim.

This case has been closed as per your letter of August 27th, 1938.

In addition to the above cases which have been discussed at my office, we will also settle the following time claims for which no case numbers have been assigned. These claims all involve the handling of cars by cranes in the South Chicago Yard.

Case No. 54-A—Time claim August 12, 1937.

C. F. Fox—Eight Dollars and Three Cents ($8.03);

F. X. Lingerman—Seven Dollars and Forty-five Cents ($7.45);

J. B. Murphy—Seven Dollars and Forty-five Cents ($7.45).

Case No. 54-B—Time claim September 3, 1937.

W. A. Ahrendt—Eight Dollars and Three Cents ($8.03);

C. L. Keilman—Seven Dollars and Forty-five Cents ($7.45);
L. A. Floyd—Seven Dollars and Forty-five Cents ($7.45).
Case No. 54-C—Time claim May 24, 1938.
R. Letcher—Eight Dollars and Fifty-three Cents ($8.53);
C. Ruby—Seven Dollars and Ninety-four Cents ($7.94);
J. Lynn—Seven Dollars and Ninety-four Cents ($7.94).
Case No. 54-D—Time Claim May 26, 1938.
T. P. McNulty—Eight Dollars and Fifty-three Cents ($8.53);
J. Misanin—Seven Dollars and Ninety-four Cents ($7.94);
J. Cross—Seven Dollars and Ninety-four Cents ($7.94).

We have by this letter given you a complete resume of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employees whom you represent and have proposed in this letter a very liberal disposition of all the cases involved. The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending either before the board, or under discussion with this office except Case No. 4, which it is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and
27 that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement.

Yours truly,
S. M. Rogers,
President.

cc—Messrs. J. E. Reilly,
C. L. Wilson.
C. H. Ireland,
G. E. Chessman.

Accepted for the Yardmen: Oct. 31, 1938.
C. H. Williams,
General Chairman, B. of R. T.
S. F. Johnson,
Secretary, B. of R. T.

28 EXHIBIT "D."

(Letterhead of Elgin, Joliet and Eastern Railway Co.)

October 31st, 1938.

Mr. T. S. McFarland,
Secretary, First Division,
National Railroad Adjustment Board,
220 South State Street,
Chicago, Illinois.

Dear Sir:

The following cases have been settled and we, therefore, jointly request that they be withdrawn from the Docket of the Board:

National Railroad Adjustment Board Docket No. 3533.

Claim of employes that the EJ&E Railway Company is violating Article 3 of Yardmen's Agreement.

National Railroad Adjustment Board Docket No. 3534.

Claim of employes that Yardmasters and Assistant Yardmasters are performing work of Yardmen. * * *

National Railroad Adjustment Board Docket No. 3535.

Claim of employes that Yard Crews are starting as Transfer crews. * * *

National Railroad Adjustment Board Docket No. 3537.

Complaint of employes that yard engines in S. O. Company Plant are being started at times other than those provided in Article 6 of the Yardmen's Agreement.

National Railroad Adjustment Board Docket No. 3538.

Complaint against EJ&E Railway Company because C.I.S. Corporation self-propelled cranes are used in weighing cars. * * *

National Railroad Adjustment Board Docket No. 3723.

Complaint against EJ&E Railway Company for permitting use of self-propelled cranes to perform yard work. * * *

National Railroad Adjustment Board Docket No. 3539.

Claim of R. E. Berthoff * * * August 8th, 1935. * * *

29 National Railroad Adjustment Board Docket No. 3540.

Claim of E. Schweir * * * August 3rd, 1935. * * *

National Railroad Adjustment Board Docket No. 3541.

Claim of H. Linne * * * September 3rd, 1935. * * *

National Railroad Adjustment Board Docket No. 3542.

Claim of W. O. Wilton * * * between November 10th, 1935 and January 14th, 1935.

National Railroad Adjustment Board Docket No. 3510.

Claim of F. A. Emerson, M. Barsich and S. H. Shearer * * * November 1st, 1935. * * *

National Railroad Adjustment Board Docket No. 3509.

Claim of J. W. Hoover, H. Bogart and C. Mackin * * * January 7th, 1935. * * *

National Railroad Adjustment Board Docket No. 3508.

Claim P. E. Miles * * * November 26th, 27th, 29th, 30th, December 2nd, 4th 5th, 6th, 9th, 10th and 11th, 1935. * * *

National Railroad Adjustment Board Docket No. 3511.

Claim of L. E. Clement, P. Carr and W. Brown * * * August 15th, 1935.

National Railroad Adjustment Board Docket No. 3543.

Claim of John R. Kimberlin for time lost between January 16th, 1935 and his return to work in July, 1935.

Elgin, Joliet and Eastern Railway Company,

By S. M. Rogers,
President.

For the Employes:
C. H. Williams,
General Chairman, B. of R. T., EJ&E System.

EXHIBIT "E."

(Letterhead of National Railroad Adjustment Board.)

October 31, 1938.

Mr. S. M. Rogers, President,
Elgin, Joliet and Eastern Railway Company,
208 South La Salle Street,
Chicago, Illinois.

Mr. A. F. Whitney, President,
Brotherhood of Railroad Trainmen,
Cleveland, Ohio.

Gentlemen:

The parties to claims covered by the following Docket Numbers having requested their withdrawal, they are removed from our docket:

Docket No. 3533 ex parte submission
3534 " "
3535 " "
3537 " "
3538 " "
3723 " "
3539 " "
3540 " "
3541 " "
3542 " "
3510 " "
3509 joint submission
3508 " "
3511 " "
3543 ex parte submission

Yours very truly,

T. S. McFarland,
Secretary.

TSM-wcf
cc: Mr. C. H. Williams, Genl. Chmn. BofRT.

31 EXHIBIT "F."

Award No. 5048
Docket No. 7324

National Railroad Adjustment Board

First Division

The First Division consisted of the regular members and in addition Referee Paul W. Richards when award was rendered.

Parties to Dispute:

Brotherhood of Railroad Trainmen

Elgin, Joliet and Eastern Railway Company

Statement of Claim: Claim for one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article No. 6 of the Yardmen's Agreement of the Elgin, Joliet and Eastern Railway Company, effective January 1, 1927, and appli-

cable to Whiting (Standard Oil Company) Yardmen, July 27, 1934, from dates of August 27, 1934, until November 14, 1938, inclusive.

Note: Claim made thirty (30) days after agreement was made effective on account of committees agreeing to permit this length of time for yardmen to become accustomed to the changes being made.

Employes' Statement of Facts: The inter-plant switching of the Standard Oil Company at Whiting, Indiana, was turned over to the Elgin, Joliet & Eastern Railway Company on date of July 27, 1934. The Yardmen employed by them were taken off of their payrolls and employed by the E. J. & E. Railway Company and service accepted under the Yardmen's Agreement covering E. J. & E. Yardmen. That agreement provides for a fixed starting time for yard crews in Article No. 6. The starting time provided for was not observed in the Whiting yard until November 15, 1938, at which time the Management agreed with the Brotherhood of Railroad Trainmen to place Whiting yard crews on fixed starting time. The Management always contended that the committees for the organizations agreed with them that the starting time provided for in the Yardmen's Agreement did not need be applied in the Whiting yard. The committees contend that they consented to permitting them to keep the starting times in effect while the work was being done by the Standard Oil Company for a period of thirty days in order that the yardmen might become accustomed to the change.

Position of Committee: This claim is made for payment of time by the Yardmen of Whiting Yard and is supported by Article No. 6 of the Yardmen's Agreement. It is not for this Committee to decide on the veracity of the claims made by either the carrier or the committee negotiating taking over the switching at Whiting. It is the judgment of this Committee that the matter of starting time was of equal importance in arranging the agreement at Whiting as it was when made to cover the yardmen on the E. J. & E. proper. A statement that certain agreements were reached does not support the carriers contention. Even if such agreements were reached it would not be possible to invalidate the prescribed written rule of Article 6. It could be claimed by the carrier that the committees had agreed that the Schedule did not apply to the Whiting Yard, but surely if it or any rule therein was to be understood to not

apply, they should have been confined to writing in order that future committees would understand them.

If the Management and the Committees failed to so negotiate, this Committee cannot give consideration to the claim that it was so negotiated. The part of Article 6 of the Yardmen's Agreement is applicable to the case and supports the claim.

"Article 6, 'A'—'B.'
(in part)

"(A) Regular assigned yard crews will each have a fixed starting time and the starting time of a crew will not be changed without at least forty-eight (48) hours advance notice. Present practice as to handling of transfer crews is not affected by the foregoing. No yardman will be required to work more than one (1) assigned period in any twenty-four (24) consecutive hours.

"(B) Yard crews shall have a designated point for going on duty, and a designated point for going off duty. Starting time of yard crews on one, two or three 8-hour shifts will be as follows:

Underlining of the words, 'will be,' is mine.

"7:00 A. M., 8:00 A. M. and 8:30 A. M.
3:00 P. M. and 4:00 P. M.
11:00 P. M. and 12:00 M. and 12:30 A. M."

A request was made by this Committee to Mr. T. D. Beven, General Manager for a complete list of crews in the Whiting Yard started at times other than the fixed starting time provided for in Article No. 6. Reply is herewith quoted:

"Joliet, Illinois
March 6, 1939.

Mr. C. H. Williams,
Gen. Chairman, B. of R. T.,
603 Jackson Street, Joliet, Illinois.

Dear Sir:

It will not be consistent to furnish information showing starting time of all yard crews from July 27, 1934 to and including November 14, 1938, as requested in yours of March 1st.

I am at a loss to understand the reason for this request as any claim affecting starting time in the Standard Oil

Company yard at Whiting prior to November 15, 1938 was disposed of by an agreement made between you and Mr. Rogers as covered in letter to you dated October 28, 1938.

Yours truly,
(Signed) T. D. Beven,
General Manager."

In order that all matters be made clear in this case, reference is made by excerpts from letters to the Management by the Committee during the process of negotiation and the agreement reached on date of October 28, 1938, whereby Labor Board Docket No. 3537 was withdrawn from the Board. There were no agreements reached whereby payment for violation of Article No. 6 of the Yardmen's Agreement would be waived as a result of withdrawal of Labor Board Docket No. 3537. In fact that case held no claim
32 for payment for time. It was simply a case to settle the dispute as to the carrier's right to force the yard crews in the Whiting yard to work at times other than the fixed starting time provided for in Article 6. Certainly there are no words in the agreement reached which implies in any manner that the committee waived the right to claim for payment for violations prior to withdrawal of the case from the Board. It should be clear that by placing the correct starting time into effect that thereafter there were no violations and the clearness in which the provision is written shows that all that was agreed to was, that after a 90 day trial the committees would meet and confer as to whether fixed starting time was feasible. This was done on date of February 27, 1939, and no reason was shown why a change should be made. The decision in the case is as follows:

"Case No. 5—Labor Board Docket No. 3537—Starting time of switch engines in Whiting S. O. Yard.

Settled by agreement that the starting times, for a ninety day trial period commencing November 15th, 1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employes claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in satisfaction to our employes and to the industry served, then representatives of the Railway Company and representatives of the Yardmen, and representatives of the Engineers and

representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry."

Reference is made to my letter addressed to Mr. Rogers on date of August 22, 1938, specifically showing the conclusions reached by them on proposals for settlement of the cases pending. Each case referred to separately. Docket 3537 is referred to in the last paragraph of page two and reads as follows:

"3537—It is noted that despite our offer to place the starting times of Whiting yard crews on a trial for a period of 90 days on their regular starting time, you desire to cut that to 30 days. You refer to a verbal understanding in an agreement between the committees, including my predecessor, that the present starting time would prevail. I am not bound to any verbal agreements of my predecessor had he made one, nor will my successor be bound by one made by me if I make one. However, I will not make one, nor will I consider the one you contend was was made to cover starting time in the Whiting Yard. The record shows, and Mr. Meade confirms that it was agreed to accept the conditions as they were for a period of thirty days. You declined to even change it and in the absence of a written agreement my committee contends for regular starting time. We do not think a true picture can appear in less than a 90 day trial."

Note: The above should have read that the letter referred to was of August 22, 1938.

Reference is also made to my letter of July 30, 1938 at page three, which also refers to Case 3537. I quote first paragraph.

"It has been contended that it was impossible to operate in this plant on established starting time as provided for in the Yardmen's Agreement of the Elgin, Joliet & Eastern Railway Company. In order to dispose of this case, the engines working in this plant shall be started by the established starting time for a period of three months commencing with the 1st day of September and remain on schedule starting time for a period of three months until December 1st. If by that time there is established proof that injustice is being done, the joint committees of the B. of L. E., B. of L. F. & E. and the B. of R. T. will meet the officials for the purpose of regulation or adjustment."

As stated before, Case No. 5—Labor Board Docket No. 3537 contained no claim for pay to Whiting Yardmen.

Consequently it was not a question before the Management and the Committee in the starting time negotiation and, claim cannot be made that a waiver was made on a matter which was not negotiated. The claim that such was done cannot be supported by any record.

The fact of the matter is, the problem causing concern was the matter of the Carnegie-Illinois Steel Corporation using locomotive cranes to perform switching service within the South Chicago Yard was the factor in obtaining the settlement of cases in the agreement reached on October 28, 1938. Attached hereto is a copy of my letter of July 25, 1938, from the third paragraph to the end conclusively shows there had been lengthy periods of violation involving many thousands of dollars in penalty payment if a favorable award was made for the employes.

At the request of Mr. Bond, I had a lengthy interview on this matter at the time the arbitrary allowance to Roadmen was made in Chicago, however, since I object to verbal claims I shall not contend for what occurred in that case, but he will undoubtedly recall it concerned the South Chicago Yard and not the Whiting starting time.

Therefore, on the merit of the claim, time is claimed as specified in "Statement of Claim" in this case.

Carrier's Statement of Facts: Prior to July 27, 1934, the intra plant switching and the terminal work within the Standard Oil Company yard at its refinery at Whiting, Indiana, was performed by plant engines manned by crews in the employ of the Standard Oil Company. According to the best information available the industry worked a maximum of seven (7) regular engines daily and such additional extra engines as might be found necessary due to the volume of business. These engines were started at such times as the plant management required without regard to regularity or continuity.

On July 27, 1934, the Elgin, Joliet and Eastern Railway Company took over this service and by agreement with the representatives of the several classes of interested employes commenced to work in this yard with the understanding with its employes that provisions of Article 6 of the Yardmen's Agreement and similar agreements with other interested employes could not be adhered to, but that as the work progressed the starting time of the yard engines would be rearranged to conform as closely as possible with the starting times provided for in said agreements. Owing to plant operations some of these engines were

started at times at variance therewith until November 15, 1938, on which date all engines were started at the times specified in the schedule. This was done by a letter agreement with the General Chairman of the B. of R. T. dated October 28th, 1938, and with the distinct understanding with the representatives of the several classes of the interested employes that if after a ninety (90) day trial period it was found that such starting times did not result in efficient and economical operation or in satisfaction to the employes and to the industry that these representatives would meet with the Management and attempt to work out a schedule of starting times that would fit the requirements of the industry and satisfy as far as possible the interest of the employes.

Position of Carrier: Shortly before July 27th, 1934, the Executive Officers of the Elgin, Joliet and Eastern Railway Company, hereinafter called the "Carrier," were approached by Officials of the Standard Oil Company, hereinafter called the "Industry," and a proposal made
33 that the Carrier take over the plant switching, which under its tariffs it holds itself out to do, and also to perform the terminal work for all of the railroads serving the plant. There are four (4) railroads other than the Carrier serving this plant with their own rails, but in the interest of economy and efficiency it was desirable that one (1) railroad do all of the terminal work.

A conference was held with the representatives of the engineers, the firemen and the yardmen employed by the Carrier, on July 24th, 1934, and the situation discussed in all its details including the starting time. The performance of the plant switching by the Carrier was recognized as being desirable by both the Carrier and its employes, and it was understood at the outset that there could be no adherence to the general rules governing starting time, but that after the work had been handled for a sufficient time to determine what could be done, an effort would be made to conform as nearly as possible to the starting times provided for in Article 6 of our Yardmen's agreement and similar provisions in agreements with the other interested employes. This was done and during the period July 27, 1934, to November 15, 1938, many of the engines were started at the scheduled hours, or very nearly so. There were some engines, however, that because of plant operation were required at times during the day which made it

necessary to start them at other than the exast times provided for in Article 6 of the Yardmen's agreement. This was principally due to the necessity of taking care of the peak business.

Negotiations were carried on with the representatives of the employes during the period between July 27, 1934 and October 28, 1938, relative to the efforts being made to bring the starting time of these engines more closely in conformity with the general rules and in the latter part of 1936 the following complaint was submitted to your Honorable Board ex parte by the General Chairman of the B. of R. T. identified as Docket No. 3537—

"Complaint of employes that yard engines in the plant of the Standard Oil Company at Whiting, Indiana, are being started at times other than those provided in Article 6 of the Yardmen's Agreement."

This and several other cases filed by the B. of R. T., which were before the Board, were settled by a letter agreement, excerpts from which bearing on this particular case are quoted below:

"October 28th, 1938.

Mr. C. H. Williams,
General Chairman, Brotherhood of Railroad Trainmen,
603 Jackson Street,
Joliet, Illinois.

Dear Sir:

Since my letter of August 18th in which I tentatively proposed settlement of certain matters of grievance we have had further correspondence and conferences which have modified our decision in some cases. Therefore, in order that the whole matter be placed in concrete form I am outlining below our proposals to settle all of the cases except as otherwise specified.

* * * * *

Case No. 5—Labor Board docket No. 3537—Starting Time of Switch Engines in Whiting S. O. Yard.

Settled by agreement* that the starting times, for a ninety day trial period commencing November 15th, 1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employes claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in

satisfaction to our employes and to the industry served, then representatives of the Railway Company and representatives of the Yardmen and representatives of the Engineers and representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry.

* * * * *

We have by this letter given you a complete resume of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employees whom you represent and have proposed in this letter a very liberal disposition of all of the cases involved. The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending either before the Board, or under discussion with this office except Case No. 4, which it is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement.

Your truly,

(Signed) S. M. Rogers,
President.

Accepted for the Yardmen: Oct. 31, 1938

(Signed) C. H. Williams,
General Chairman, B. of R. T.

(Signed) S. F. Johnson,
Secretary, B. of R. T."

* Note—The agreement referred to was a verbal agreement which the letter confirmed.

Accordingly, the Carrier and General Chairman Williams jointly notified the Board by letter to Secretary T. S. McFarland dated October 31, 1938 that these cases were settled and on the same date Secretary McFarland addressed a joint letter to Mr. A. F. Whitney, President B. of R. T. and Mr. S. M. Rogers, President of the Carrier, stating that these claims were removed from the Docket of the Board. A copy of this letter was sent to General Chairman Williams by Secretary McFarland.

The claim in dispute has no merit whatsoever and in presenting it to the Carrier, General Chairman Williams violated the following part of the aforesaid letter agree-

ment dated October 28th, 1938, executed by the Carrier and General Chairman Williams and Secretary Johnson of the B. of R. T.

"The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending either before the Board, or under discussion with this office except Case No. 4, which it is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement." (Underscoring mine.)

34 The underscored wording specifically provides that the settlement accepted for the Yardmen by the General Chairman and Secretary of the B. of R. T. was a complete settlement of the complaint in Docket No. 3537 and that such acceptance covered not only the complaint in Docket No. 3537 but "all claims of a similar nature." In accepting the settlement, General Chairman Williams further agreed by the positive and unmistakable terms quoted above that—"no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement." This clearly and definitely means that by his acceptance of the settlement, General Chairman Williams agreed that the Yardmen were not to present to the Carrier any claims incident to, connected with or growing out of the complaint in Docket No. 3537.

While, of course, the Carrier has not seen the ex parte submission of the employes, we assume General Chairman Williams will claim therein, as he did in a letter to the undersigned dated March 28, 1939, that there was no agreement made on July 24th, 1934 between the carrier and the representatives of the several classes of employes interested, including Mr. L. A. Hyde, then General Chairman of the B. of R. T., which authorized the Carrier to start some of tis engines in the industry at times other than those specified in our Yardmen's agreement. In effect, he stated in that letter that if such an agreement was made it was not made with his Committee, and because it was not in writing it could not bind the present Committee.

This, to say the least, is a very unusual position to take. We positively state that there was a verbal agreement made on July 24th, 1934 between the Carrier and the representatives of the several classes of employes interested which authorized the Carrier to start some of its engines in the Industry at times other than those specified in our Yardmen's agreement and that General Chairman Williams was aware of its existence and terms, which he acknowledged, by his acceptance of the terms of the letter agreement dated October 28, 1938. The existence of this verbal agreement is unquestionably substantiated by the following language in the aforesaid letter agreement signed by Messrs. Williams and Johnson.

"Settled by agreement that the starting times for a ninety day trial period commencing November 15th, 1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed." (Underscoring mine.)

If it were not for the recognition of the aforesaid verbal agreement—

(a) It is obvious that Mr. Williams, or his predecessor would have presented the instant claim immediately after the expiration of the claimed thirty-day period mentioned in the "Note" below the "Statement of Claim" and not four and one-half years after the agreement was made, or

(b) He would have made the instant claim part of the claim covered by Docket No. 3537 and

(c) He would have taken exception to the provisions of the settlement reading "instead of the starting times heretofore agreed upon and now being followed."

General Chairman Williams does not even now contend that there was no agreement made waiving the provisions of Article 6 of the Yardmen's agreement. On the contrary he admits in the presentation of his case that there was such an agreement but claims that it expired on August 26, 1934.

At this point the Carrier wishes to state positively that there was not connected with the agreement of July 24, 1934, any restrictions as to the period during which the provisions of Article 6 of the Yardmen's Agreement, and similar provisions in the agreements with the engineers and firemen, would be waived. This thirty (30) day limitation now claimed was never mentioned in conversations

or correspondence regarding the subject of the starting time in the Industry until ovember 3, 1938, when Chairman Meade of the B. of L. F. & E. referred to it casually in a conversation with the Vice President of the Carrier, at which time the statement that there was any such restriction was promptly denied by the Vice President.

It is very significant that in all of the negotiations regarding the arrangement of the starting time which have been carried on from time to time during the past 4½ years, that there was never, until the claim referred to, which has been filed with the Board by the B. of L. F. & E. and covered by Docket No. 6788, any denial on the part of any of the Committees that there was an agreement waiving the starting time rule, or claim made that such an agreement was limited to a thirty (30) day—or any other specified period.

The subject of starting time in this yard has been one of correspondence and conference with the General Chairman of the B. of R. T., but until March 15, 1939, when a claim for time was presented to the General Manager of the Carrier, neither the present Chairman of the B. of R. T., nor his predecessor, with whom the agreement was actually made, has ever denied the existence of such an agreement or claimed that there was any time limit involved in it. As a matter of fact it would have been impossible for this Carrier to agree to a time limit when the work was taken over, because, as it explained to the representatives of the employes, it had no knowledge of how the work was performed in the plant and would not be able to make any definite statements with respect to changes in the method of operation until it had an opportunity to see what could be worked out. This referred particularly to the starting times, and while the Carrier did agree that it would, insofar as it might be practicable, start engines at the times specified in the agreement it said that there might have to be exceptions made.

It is not at all unusual to make exceptions to starting time in connection with industrial switching. The switching and terminal service in an industrial yard is entirely different from the switching service performed in a Carrier's yard where schedule times can usually be adhered to without loss of efficiency. In handling work for an Industry the requirements of the plant are paramount and the engines must be started and worked in harmony with

the plant operation. As illustrative of these exceptions attention is called to those in Article 6 applied to other plants served by the Carrier.

"Starting time of yard crews on one, two or three 8-hour shifts will be as follows:

7:00 A. M., 8:00 A. M. and 8:30 A. M.
3:00 P. M., and 4:00 P. M.
11:30 P. M., 12 midnight and 12:30 A. M.

except in hot metal and cinder, coke over, Buffington and Waukegan districts, in one, two or three shifts, starting time will be 6:30 A. M., 7:00 A. M., 7:30 A. M., and 8:00 A. M., 2:30 P. M., 3:00 P. M., 3:30 P. M., and 4:00 P. M.; and 10:30 P. M., 11:00 P. M., 11:30 P. M., and 12 o'clock midnight.

Starting time for Stockton engines will be 6:30 A. M., 1:30 P. M. and 8:30 P. M.

Starting time for yard crews handling ore at South Chicago will be 6:00 A. M. and 1:00 P. M.

Starting time for yard crews handling coal and ore at Gary will be 6:00 A. M. and 1:00 P. M.

Starting time for yard crews assigned to coal loading and unloading at East Joliet will be 6:30 A. M."

35 It will be noted from the above that many exceptions were made on account of conditions which had to be met.

After the work in this plant had been assumed by the Carrier a great many changes were made in the starting time of the engines and through the cooperation of the plant considerable progress was made, until effective November 15, 1938, it was agreed that for a trial period of ninety days, all of the engines would be started at the times specified in the agreements.

In view of the foregoing the filing of this claim is not only a violation of the verbal agreement made on July 24, 1934, with the representatives of the yardmen, the existence of which is acknowledged by the acceptance of the terms of the letter of settlement dated October 28, 1938, but is also a violation of the very terms of that letter because the letter itself constitutes an agreement that "no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement." It is plain that this claim arises out of the cause complained of in the claim filed with the Board as Docket No. 3537, which

was withdrawn as a result of this settlement. Therefore, the Carrier respectfully requests that the claim be dismissed, but if further consideration is given to it the Carrier requests that oral hearing be granted and that it be given an opportunity to present witnesses.

All data submitted in support of the Carrier's position was presented to the employes and made a part of the particular question in dispute.

(Exhibits not reproduced.)

Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28th, 1938, accepted by employes October 31, 1938.

Award.

Claim denied per Findings.

National Railroad Adjustment Board
By Order of First Division
Attest: (Sgd.) T. S. McFarland,
Secretary.

Dated at Chicago, Illinois, this 6th day of September, 1940.

36 And on, to wit, the 24th day of December, 1940, the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Notice in words and figures following, to wit:

Filed Dec. 24, 1940.

37 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2341) * *

NOTICE.

To: Knapp, Allen and Cushing
208 South LaSalle Street,
Chicago, Illinois.

Please Take Notice that on Tuesday, December 24, A. D. 1940, in the forenoon or as soon thereafter as counsel may be heard, I shall appear before His Honor Judge John P. Barnes, in the room usually occupied by him as a courtroom, in the Federal Building, Chicago, Illinois, or in his absence before such other Judge as may be sitting in his place and stead, and shall then and there present a motion, a copy of which is herewith served upon you, and ask that an order be entered in accordance therewith.

At Which Time and Place you may appear if you so see fit.

John H. Gately,
Attorney for Plaintiffs.

Received a copy of the above and foregoing notice with motion attached, this 21st day of December, A. D. 1940, before the hour of 12:00 o'clock noon.

Knapp, Allen and Cushing.
Motion No. .....
Page No. .....

38 And on, to wit, the 24th day of December, 1940, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Motion to Strike in words and figures following, to wit:

49 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Dec. 24, 1940.
* * (Caption—2341) * *

MOTION TO STRIKE.

Now come the plaintiffs herein, by John H. Gately, their attorney, and move the court to strike the Motion to Dismiss filed herein by the defendant in the above entitled cause for the following reasons:

(1) That said Motion to Dismiss sets up new and additional evidentiary matter not covered by the complaint filed herein, namely, what amounts to a plea of release and also a plea of res adjudicata, both of which matters are properly pleadable under the rules of this court, namely, Rule 12, sub-paragraph (b) by a responsive pleading;

(2) That said Motion to Dismiss is also contrary to Rule 8 of the Rules of Civil Procedure of this court, which states that matters as set forth therein, shall be set forth in a pleading;

(3) That to properly hear the Motion to Dismiss as filed herein and any reply thereto, it would be neces-
40 sary for this court to hear evidence which cannot be done on a Motion to Dismiss.

Wherefore, your plaintiffs pray that the Motion to Dismiss filed herein, may be stricken and a rule entered upon said defendants to file their answer to the complaint filed herein within a short date to be fixed by the court, or that judgment may be entered herein in favor of plaintiffs.

John H. Gately,
Attorney for Plaintiffs, Harry M. Alderman, F. E. Beccue, W. R. Bramer, et al.

41 And afterwards, to wit, on the 24th day of December, A. D. 1940, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

Entered Dec. 24, 1940.

42 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—2341) * *

Tuesday, December 24, 1940.

Present: Hon. John P. Barnes, District Judge.

This day come the Plaintiffs by their attorney and enter their motion to strike Defendant's motion to dismiss which motion and the Defendant's motion to dismiss are set for hearing January 13, 1941.

Filed Jan. 13, 1941.

43 And on, to wit, the 13th day of January, 1941, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion for Summary Judgement in words and figures following, to wit:

44 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—2341) * *

MOTION FOR SUMMARY JUDGMENT.

The defendant, Elgin, Joliet and Eastern Railway Company, a corporation, by Harry I. Allen and Paul R. Conaghan, its attorneys, hereby moves the Court to enter summary judgment for the defendant, and in support of said motion, in accordance with the provisions of Rule 56 (b) of the Rules of Civil Procedure, the defendant refers this Court to be affidavit of T. E. Bond heretofore filed in this Court, attached to the motion of the defendant to dismiss the complaint herein.

Harry I. Allen,
Paul R. Conaghan,
Attorneys for Elgin, Joliet and Eastern Railway Company, a corporation, defendant,
208 S. LaSalle Street, Chicago, Ill.

45 And on, to wit, the 29th day of January, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Reply to Motion in words and figures following, to wit:

46 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Jan. 29, 1941.
* * (Caption—2341) * *

REPLY TO MOTION SETTING UP PLEAS OF RES ADJUDICATA AND RELEASE ON A MOTION FOR A SUMMARY JUDGMENT.

Summary Judgment.

(1) A summary judgment should not be entered in this cause for either party because there are certain issues of fact involved herein that have been raised by the affidavits of the defendant and plaintiffs that should be tried by a jury;

(2) The letter under date of October 28, 1938, pleaded by the Defendant as a release in its motion, should not be considered as a release of the plaintiffs' individual claims against the Defendant for the following reasons:

(a) In order to be a valid release, there must be a proper subject matter, competent parties, a consent or meeting of the minds of the parties, and a valid con-
47 sideration. Plaintiffs' own exhibits demonstrate that one of the signers to the letter, C. H. Williams, did not understand the letter to be a release of the individual claims of the Plaintiffs herein, for immediately after the execution of said release, he filed what purported to be individual claims on behalf of the Plaintiffs herein, without authority, against the Defendant with the National Railroad Adjustment Board. It is also apparent that there was a total want of consideration. The affidavits also show that insofar as Williams is concerned, he was an incompetent party;

(b) The letter of October 28, 1938, upon examination, according to its own terms, cannot act as a valid release of the individual claims of the plaintiffs herein;

(c) C. H. Williams, as General Chairman of the Brotherhood of Railroad Trainmen, had no authority to present or compromise the individual claims of the plaintiffs. His authority was limited to prosecuting a complaint before the Board to compel the Defendant to comply with Article 6 of the agreement, by furnishing engines and work for the members of the Brotherhood at the times

specified in said "schedule" and the so-called release being a letter of October 28, 1938, was without consideration and therefore void.

(d) Officials of the Brotherhood of Railroad Trainmen, under the Constitution and rules, cannot release the claims of the individual members of the Union without specific authority so to do granted by the individual members themselves, nor can they submit to any compromise of any grievance without such a submission of which the Defendants had knowledge.

(3) The award of the National Railroad Adjustment Board cannot be considered as an adjudication of the
48 Plaintiffs' individual rights set up by a plea against the Plaintiffs herein because said Board was without jurisdiction of both of the parties and of the subject matter for the following reasons:

(a) The officials of the Brotherhood of Railroad Trainmen had no authority to present any individual claims of the Plaintiffs herein to the Defendant, nor to the National Railroad Adjustment Board, for consideration, because there had been no meeting of the Local Lodge authorizing the presentation of any grievances nor any forwarding of any authorization to the General Chairman, as required by the Constitution of the Brotherhood, of which the Defendant was aware;

(b) No notice was given to, nor received, by the Plaintiffs of the pendency of any hearing nor of the hearing held by the National Railroad Adjustment Board, under which the award pleaded herein was rendered;

(c) By the specific wording of the Statute under which said National Railroad Adjustment Board rendered its "award" pleaded herein, said award is not final nor binding on any of the parties thereto even though your Plaintiffs herein should be considered as having been proper parties to said proceeding because said Statute provides:

"Said award shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award."

(d) The Statute under which said award is pleaded, U. S. Code Annotated, Title 45, Paragraph 153, violates the due process clause, Fifth Amendment to the Federal Constitution, because in and by said Statute the defeated employee who is defeated before said Board has no right

of the review of any decision handed down by said
49 Board; but a defeated employer when the order on the award is sought to be enforced has a right of review in the Federal District Court, and the Appellate Court, and the United States Supreme Court;

(e) If it should be held that the National Railroad Adjustment Board acts merely as an arbitrator, then any decisions thereunder are void because it passes on matters and basis its decision and its opinion on law and fact which is contrary to public policy.

Wherefore, Plaintiffs herein move the court to overrule the Motion for summary judgment of the Defendant; and to hold that the letter dated October 28, 1938, is not a release of any claims of the plaintiffs herein, and that the award of the National Railroad Adjustment Board is either not a final adjudication as to the Plaintiffs herein; or that said award is void as to these Plaintiffs for lack of jurisdiction of the parties of the subject matter; or void because said Act under which award was entered is unconstitutional.

John H. Gately,
Attorney for Plaintiffs.

50 And on, to wit, the 29th day of January, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Counter Affidavit in words and figures following, to wit: Filed Jan. 29, 1941.

51 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—2341) * *

COUNTER AFFIDAVIT TO AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS.

State of Illinois, } ss.
County of Cook. }

We, the undersigned, being severally first duly sworn on oaths depose and says that we are some of the plaintiffs in the above entitled cause and that we make this as a counter-affidavit for ourselves and the other plaintiffs herein to the affidavit filed by the defendant herein and state as follows:

1) That the Brotherhood of Railroad Trainmen, a duly licensed association of railroad employees throughout the

United States of America, hereinafter referred to as the B. of R. T. entered into a schedule or working agreement with the Elgin, Joliet & Eastern Railroad Company, a corporation, hereinafter referred to as The Company, on behalf of all of its members working for the Defendant
52 on any of its lines or yards throughout the system of the Defendant, said agreement to be effective January 1, 1927. Said agreement was to be—"in effect until April 1, 1928, and thereafter until thirty days notice shall have been given by either party of their desire to change or terminate the same or any part thereof", and signed by P. F. McManus as General Superintendent and approved by J. M. Rogers as Vice President, both of the Elgin, Joliet & Eastern Railroad Company, a corporation, and by Samuel E. Wilson, General Chairman and W. L. Wall, Secretary, both of the B. of R. T. That said agreement still stands in full force and effect and that no notice of the abrogation or cancellation thereof has been given by either party thereto.

2) That on about July 24, 1934, many of the Plaintiffs herein had been working for the Standard Oil Company of Indiana, a corporation, as yardmen in their yard, located at Whiting, Indiana, and designated as "The Whiting Yard".

3) That in the early part of July, 1934, Plaintiffs desired to join the B. of R. T. and were advised by the Standard Oil Company that they would not operate the yard, but would turn the same over to the Defendant company herein.

4) That the plaintiffs herein who were then working at "The Whiting Yard" joined the B. of R. T. and that thereafter by proper resolution they had their duly elected officials meet with the officials of the Company for the purpose of reaching an agreement as to working conditions, hours, rates of pay, et cetera.

5) That said officials reached an agreement with the Company. Said agreement being that they would work under the "schedule" then in force dated January 1, 1927, that had been previously obtained by the B. of R. T. with the Company, subject however, to a thirty day suspension of Article 6 of said agreement.

6) That thereafter said officials of the B. of R. T. then called a special meeting of the members of the B. of
53 R. T. who had been working in the "Whiting Yard" and submitted said agreement to them for their con-

sideration and approval. That the said members after discussion thereon, voted upon, and accepted said agreement, which included the thirty day suspension of Article 6 and ratified the terms thereof.

7) That thereafter notice of the action of said members in the acceptance of said agreement was forwarded to the Grand Lodge of the B. of R. T. in Cleveland, Ohio, in accordance with the Constitution and by-laws of the B. of R. T., and the Company was notified of the acceptance of said "schedule" by the duly authorized officials of the members of the B. of R. T. working the "Whiting Yard."

8) That said plaintiffs herein thereafter appeared at the "Whiting Yard" to begin working for the Company, That when they talked to the local officials of said Company in reference to employment and when told that they were employed by the Company, they were also advised that they were to work under the "schedule" of the Company with the B. of R. T. to which they agreed, and many of them were given a copy of said "schedule" by said officials of said Company at that time.

9) That after said "schedule", or agreement, was entered into between the members of the B. of R. T. working in the "Whiting Yard" and the Company, and after the plaintiffs herein had entered into the employment of said Company and performed the duties thereunder, the Company, on August 27, 1934, refused to abide by Article 6 of said agreement in that it refused to furnish your Plaintiffs with engines or engine crews when they reported for duty at the times specified in Article 6 of said "schedule" as aforesaid, although the Plaintiffs were ready, willing and able to perform their obligations thereunder.

54 10) That numerous complaints were made to the officials of the Defendant Company in accordance with the "schedule" and in accordance with the B. of R. T. Constitution and rules, but that said Defendant persisted in refusing to abide by terms of Article 6 of said "schedule".

11) That thereafter, a meeting of the plaintiffs at lodge 281 of the B. of R. T., of which your Plaintiffs were members, was held and the officials of said lodge were authorized to present to the officials of the Company, the Plaintiffs' grievance against that Company for the failure and refusal to abide by their obligations as set forth in Article 6, and upon said B. of R. T. officials inability to persuade the officials of the Company to conform to the provisions of Article 6, your plaintiffs were informed that the officials

of the B. of R. T. were unable to persuade the Company to agree to abide by Article 6. Said officials of the B. of R. T. were then authorized to file a complaint with the National Railroad Adjustment Board to enforce the terms thereof and compel the Defendant to perform thereunder.

12) That the Company also refused to enter a stipulation of facts to be submitted to the National Railroad Adjustment Board, and that therefore, said officials of the members submitted said complaint to said board "ex parte" to endeavor to have said Board compel the Company to furnish your Plaintiffs with engines and the work as set forth in Article 6 of the "schedule".

13) That after the meeting authorizing the officials of the B. of R. T. to file the complaint for the enforcement of Article 6 of said "schedule" the Plaintiffs through their local foreman, filed time slips with the Company for the time due them by Defendant for its violation of Arti-
55 cle 6.

14) That neither these affiants nor any of the Plaintiffs in this cause did at any time authorize or direct C. H. Williams, as General Chairman of the B. of R. T. nor S. F. Johnson, as Secretary of the B. of R. T., to present or file with the National Railroad Adjustment Board, any of their personal claims against the Company herein.

15) That the Plaintiffs herein never authorized C. H. Williams, S. F. Johnson, nor anyone to sign said letter, and had no knowledge of the signing of the letter of October 28, 1938, set out as Exhibit C of the Defendant's affidavit, until a few days after the decision of the National Railroad Adjustment Board which was rendered September 6, 1940, and that they at no time have ever received any consideration from the Defendant Company herein nor from C. H. Williams, for the waiving of any claims as set out in said letter.

16) That the authority of C. H. Williams as Chairman, and S. F. Johnson as Secretary, to act for these Plaintiffs and for and on behalf of Lodge 281 of the B. of R. T. and the members thereof under the Constitution rules and regulations of the B. of R. T. is specifically limited; that the Defendant herein had knowledge of the limitations set up in said Constitution, rules and regulations, the pertinent parts thereof being attached hereto as Exhibit A.

17) That the Plaintiffs herein were not notified of any hearing, had no knowledge of any hearing, nor were they present at any hearing, wherein any adjudication of any

of their personal claims was to be passed on by the National Railroad Adjustment Board.

18) That your Affiants state that they have recently been informed that C. H. Williams was notified to
56 bring to the hearing of the National Railroad Adjustment Board, ten or fifteen of the Plaintiffs members hereof.

19) That said Williams and Johnson had no authority, express nor implied, from any of the Plaintiffs herein, to waive any claims of your Plaintiffs as set forth in the letter of October 28, 1938.

20) That C. H. Williams and S. F. Johnson failed to notify your Plaintiffs as members of Lodge 281 of the B. of R. T., at any time, of their "settlement of claims" as set forth in a letter of October 28, 1938.

21) That the Brotherhood of Firemen and Enginemen had also filed a complaint with the National Railroad Adjustment Board growing out of the same grievance and that the facts in their claim were identical with the facts under which the claim filed by C. H. Williams, purportedly in the Plaintiffs' behalf, and that on the same date that the award was rendered denying C. H. Williams' purported claim for Plaintiffs herein, an award was entered by the National Railroad Adjustment Board in favor of the Brotherhood of Firemen and Enginemen, a copy of said award being attached hereto as Exhibit B.

Further Deponents Sayeth Not.

L. S. Christine,
F. E. Beccue,
J. C. Newman,
G. W. Burley.

Individually subscribed and sworn to before me, a Notary Public, this 27th day of January, A. D. 1941.

Hyman M. Greenstein,
Notary Public.

(Seal)

57 **EXHIBIT A.**

Constitution and General Rules of the Brotherhood of Railroad Trainmen.

Officers and Duties of General Grievance Committee and Board of Adjustment.

Rule No. 3.

A General Grievance Committee shall not revise or change a general or system wage schedule or agreement unless authorized to do so by a majority vote of the lodges on the system or by a majority vote of the membership on the system if such vote is deemed advisable by the general committee, and it may, when authorized so to do, make and enter ito contracts of agreement not inconsistent with the law and policy of the Brotherhood, with the railroad, the employes of which it represents, concerning rates of pay and working conditions.

* * * * *

Failure of Local Committee to Adjust

Rule No. 7.

When the local chairman or grievance committee fails satisfactorily to adjust any grievance referred to it, as provided in the foregoing rules, and if the lodge so orders it, the secretary of the lodge shall immediately send a certified copy of the grievance to the chairman of the general grievance committee, and a duplicate copy of the grievance to the President of the Brotherhood. It shall be the duty of the chairman of the general grievance committee, on receipt of certified copy of grievance, to appoint a time for the consideration of the grievance, and to summon the secretary of the general grievance committee, and the chairman of the local grievance committee of the lodge where the grievance exists, to meet with him at an appointed time, in the city where the headquarters of the general superintendent or the general manager of the railroad, for that part of the system on which the grievance exists, is located. A committee thus constituted shall have power to alter, amend, add to or strike out or with the approval of the President refer to the Legislative Department of

the Brotherhood any part or all of any complaint or claim submitted to the committee, subject to appeal to the entire General Committee and/or Board of Appeals. A general grievance Committee may authorize their chairman to handle all grievances received from local lodges with the management for settlement, failing in this, he will so report to the Secretary of the General Grievance Committee and the Chairman of the Local Lodge where the grievance exists to determine further handling.

Notification of Action on Grievances

Rule No. 8½.

Any Local, Sub or General Committee or Board of Adjustment making decision, closing out cases, accepting
58 settlements for grievances referred to them, will within thirty days from date of such action notify the Secretary of the lodge where grievance originated and the member or members filing grievance of such action and the notification to be made in writing. If the seniority of a member of some other lodge on the system is affected by such decision the member affected and the secretary of his lodge will be notified in writing.

• • • • •

General Rule 5.

All grievances must be handled by the regular local grievance committee before being referred to the general grievance committee for adjustment. Special committees cannot be appointed by the lodge for the purpose of presenting grievances because it may be thought the members of the regular committee do not favor the matter in hand.

59 EXHIBIT B.

Award No. 5049
Docket No. 6788

National Railroad Adjustment Board

First Division

The First Division consisted of the regular members and in addition Referee Paul W. Richards when award was rendered.

Parties to Dispute:

Brotherhood of Locomotive Firemen and Enginemen

Elgin, Joliet and Eastern Railway Company.

Statement of Claim: Claim for an additional day at time and one-half, at the regular daily rate, from August 26th, 1934, until the Company complies with the schedule starting time rule, for each and every fireman working in the Standard Oil Plant, Whiting, Indiana, for each and every day he was obliged to start work, at other than the schedule starting time. Claim is further made that any analogous violations of starting time rules which may have occurred subsequent to August 26th, 1934, shall be adjusted in accordance with the above claim.

Employes' Statement of Facts: On July 24th, 1934, the V. Pres. of the E. J. & E. R. R., held a meeting with the Engineers', Firemen's and Trainmen's Committees to arrange for the handling of the new work being taken over, namely; the industrial switching in the Standard Oil Plant, Whiting, Indiana. At this meeting it was verbally agreed by all concerned, to allow the Company thirty days from July 27th, 1934, in which to comply with the starting time rules of the several schedules. On July 27th, 1934, the E. J. & E. Ry. did take over the above mentioned switcher, but to date they have not complied with the Firemen's schedule starting time rule. The B. of L. F. & E. starting time rule reads in part;

Article (10). Par. (A), regularly assigned yard crews will each have a fixed starting time, and the starting time of a crew will not be changed without at least forty-eight hours advance notice. Present practice as to the handling of the transfer crews is not affected by the foregoing.

Par. (B), Starting time of switch engines on one, two or

three eight hour shifts will be as follows; 7:00 A. M., 8:00 A. M., and 8:30 A. M.; 3:00 P. M. and 4:00 P. M.; 11:00 P. M., 12 midnight and 12:30 A. M.

On July 27th, 1934, there were eight yard engines working on the following starting times;

One engine at	6:30 A. M.		One engine at	4:30 P. M.	
" " "	9:30 A. M.		" " "	7:30 P. M.	
" " "	10:30 A. M.		" " "	10:30 P. M.	
" " "	3:30 P. M.		" " "	11:30 P. M.	

The only engine that was being started on the schedule starting time was, the 11:00 P. M. engine. Some of the engines starting times were changed between July 27th, 1934, and the present. Additional yard engines have been added, making a total of twelve engines now working.

This case was handled in the usual manner, including conferences with the Pres. of the railway. The interested parties being unable to agree on a statement of facts, the employes herewith present the case ex parte and desire oral hearing.

Position of Employes: An effort was made to adjust this case with Mr. J. E. Rielly, General Supt., on Oct. 10th, 1934, without satisfaction. On Jan. 2nd, 1935, the case was handled with Mr. S. M. Rogers, the Pres. of our railroad, without satisfaction. On several subsequent dates this case was handled, but the Company would not comply with the schedule starting time rules. On Dec. 6th, 1938, we requested Mr. T. E. Bond, V. Pres., of our railroad, to join us in submitting this case to the N. R. A. B., Div. 1. Mr. Bond could not agree with us on the statement of facts, therefore, we are obliged to submit ex parte.

We maintain, the only time the Company was privileged to start an engine off the regular starting time was, during the thirty day period from July 27th, 1934, to Aug. 26th, 1934, both dates inclusive. You will note there is around the clock service in this plant. You will also note, the starting times are specific and do not provide different starting times, where two shifts are worked in, or not in continuous service, nor is an independent assignment given a different starting time.

The employes wish to cite, in further support of their claim, N. R. A. B. Div. 1, Awards 916, 917, 1232, 1233, 1247, 2947, 3065, 3072, and 3096.

Carrier's Statement of Facts: Prior to July 27th, 1934, the intra plant switching and terminal work within the

Standard Oil Company Yard at its refinery at Whiting, Indiana, was performed by plant engines manned by crews in the employ of the Standard Oil Company. According to the best information available the industry worked a maximum of seven (7) regular engines daily and such additional extra engines as might be found necessary because of the volume of business. These engines were started at such times as the plant management required without regard to regularity or continuity.

On July 27th, 1934, the Elgin, Joliet and Eastern Railway Company took over this service and subsequent thereto, rearranged the starting time of the yard engines to conform as closely as possible with the starting times provided for in Article 10 of the Firemen's Agreement, but owing to plant operations some of the engines were started at times at variance therewith until November 15th, 1938, on which date all engines were started at the times specified in the schedule, but with the distinct understanding with the representatives of the several classes of interested employes that if after a ninety (90) day trial period it was found that such starting times did not result in efficient and economical operation or in satisfaction to our employes and to the industry that these representatives would meet with the Management and work out a schedule of starting times that would fit the requirements of the industry and satisfy as far as possible the interest of the employes.

Position of Carrier: Shortly before July 27th, 1934, the Executive Officers of the Elgin, Joliet and Eastern Railway Company, hereinafter called the "Carrier," were approached by Officials of the Standard Oil Company, hereinafter called the "Industry," and a proposal made that the Carrier take over the plant switching, which under its tariffs it holds itself out to do, and also to perform the terminal work for all of the railroads serving the plant. There are four (4) railroads other than the Carrier serving this plant with their own rails, but in the interest of economy and efficiency it was desirable that one (1) railroad do all of the terminal work.

A conference was held with the representatives of the engineers, the firemen and the yardmen employed by the Carrier, on July 24th, 1934, and the situation discussed
60 in all its details including the starting time. The performance of the plant switching by the Carrier was recognized as being desirable by both the Carrier and its employes, and it was understood at the outset that there

could be no adherence to the general rules governing starting time, but that after the work had been handled for a sufficient time to determine what could be done, an effort would be made to conform as nearly as possible to the starting times provided for in our agreement. This has been done and during the period July 27, 1934, to November 15, 1938, many of the engines were started at the scheduled hours, or very nearly so. There were some engines, however, that were required at times during the day which made it undesirable to start them at the exact time provided for in Article 10 of the Firemen's Agreement. This was due to the necessity of taking care of the peak business.

The understanding reached at the conference on July 24, 1934, is outlined in detail in a letter from the Vice President of the Carrier to General Chairman Meade, representing the Firemen, dated November 16, 1938 (copy of which is attached hereto as Carrier's Exhibit "A" and made a part hereof) and is in response to a request from Mr. Meade (Carrier's Exhibits "B" and "C") to join his organization in presenting the subject of this controversy in joint submission to your Honorable Board. Refusal of the Carrier to join in submitting this case was because the "facts" as presented in the proposed submission were not correct.

In the proposed Joint Statement of Facts the statement was made that—"At this meeting (referring to the meeting of July 24th, 1934.) it was verbally agreed by all concerned to allow the Company thirty (30) days from July 27th, 1934, to comply with the starting time of the several schedules." At the conference referred to there was no such agreement, or understanding. In fact the thirty (30) day period had never been mentioned in correspondence or conferences until at a meeting between Carrier's Vice President and Mr. Meade on November 3rd, 1938, where this case and other matters were discussed, Mr. Meade referred to the thirty (30) day time limit, and at this meeting, (November 3rd, 1938) as confirmed in the Vice President's letter dated November 16th, 1938, (Carrier's Exhibit "A") it was denied by the Carrier that there ever was any such understanding with respect to a definite time limit.

Article 10 of the Firemen's Agreement, which the complainant seeks to have applied, provides for the same starting time as Article 1 of our Engineers' Agreement and Article 6 of our Yardmen's Agreement, and was agreed

upon effective as of February 15th, 1923,—more than eleven (11) years before the switching operation of the Industry Plant was undertaken by the Carrier. Had the Carrier been doing the work at the Industry's plant at the time Article 10 was agreed upon, undoubtedly exceptions thereto would have been made to cover the conditions existing at this plant the same as were agreed to in other cases where circumstances and conditions existed which were recognized as warranting different starting times. For example, Article 10 of the Firemen's Agreement provides in part as follows:

"Starting time of switch engines on one, two or three 8-hour shifts will be as follows:

7:00 A. M., 8:00 A. M. and 8:30 A. M.
3:00 P. M., and 4:00 P. M.
11:00 P. M., 12 midnight and 12:30 A. M.

except in hot metal and cinder, coke oven, Buffington and Waukegan districts, in one, two or three shifts, starting time will be 6:30 A. M., 7:00 A. M., 7:30 A. M., and 8:00 A. M., 2:30 P. M., 3:00 P. M., 3:30 P. M. and 4:00 P. M.; and 10:30 P. M., 11:00 P. M., 11:30 P. M., and 12 o'clock midnight.

Starting time for Stockton engines will be 6:30 A. M., 1:30 P. M. and 8:30 P. M.

Starting time for switch engines handling ore at South Chicago will be 6:30 A. M. and 1:00 P. M.

Starting time for switch engines handling coal and ore at Gary will be 6:00 A. M. and 1:00 P. M.

Starting time for engines assigned to coal unloading jobs at East Joliet will be 6:30 A. M."

It will be noted from the above that many exceptions were made on account of conditions which had to be met.

As evidence that not only were there exceptions with respect to the starting time rule agreed upon in the taking over by the Carrier of the work formerly performed by the Industry, but other departures from the schedule were made by agreement. For example—some of the employes of the Industry handling the engines were, at the request of the General Chairman of the B. of L. F. & E., taken into the employ of the Carrier as firemen, hostlers, cinder pit men, etc., with prior rights in the Industry's yard but without system rights. The firemen of the Carrier agreeing through their representatives not to displace the men employed as firemen, who were taken over from the Indus-

try by the Carrier, and on the other hand, the men so taken over acquired no seniority rights at any other point on the System, this being an exception to Article 14 of the Firemen's Schedule which reads—

"System rights shall govern firemen on the Elgin, Joliet and Eastern Railway. This means that firemen will be allowed to make application for all vacancies on the System."

and also constitutes an exception to Article 33 of the Firemen's Schedule—which provides in Paragraph (A) thereof—

"In case of reduction in force, unless otherwise provided, fireman will be given the privilege of taking youngest man's engine in any class of service on any division or sub-division, except regular assigned runs, or pools, where oldest men will be given the preference to runs."

The switching and terminad service in an industrial yard is entirely different from the switching service performed in a Carrier's yard where scheduled times usually can be adhered to without loss of efficiency. In handling work for an Industry the requirements of the plant are paramount and the engines must be started and worked in harmony with the plant operation.

The Officials of the Industry cooperated with the Carrier in its efforts to plan the work so that regular starting times, as nearly as possible conforming with out agreements, could be established, and as stated many of the engines were started either on the exact hour prescribed therein or nearly so. But the representatives of the Firemen and the Yardmen still insisted that further changes could be made in the handling of the work, so in order that the Carrier might have the benefit of a considered opinion, the Management suggested that representatives of the Engineers, Firemen and Yardmen, together with Operating Officials of the Carrier, make a study of the situation and submit such recommendation as to changes which in their opinion could be put in force without interfering with the operation of the Industry, it being recognized by all that this is a highly competitive situation and that the necessity of satisfying the plant must be borne in mind.

The suggestion that a study be made of the situation was made at conferences with representatives of the Yardmen and Firemen when this subject was brought up, and on

May 11, 1935, a letter was addressed to Mr. Meade, General Chairman of the Firemen's Committee and Mr. L. A. Hyde, then General Chairman of the Yardmen's Committee, suggesting a joint conference with their Committees and the Committee representing the Engineers. This letter was never replied to, nor was the subject again mentioned until it was brought up at a conference between the Carrier and the Committees representing the Yardmen and
61 Firemen on March 19th and 20, 1936, during the proceedings of which some mention was made of the subject although not on the docket of subjects to be considered at the meeting. It was discussed in an informal manner and again the suggestion was made that a study should be entered into and proposal for any changes be submitted. The only action which was ever taken on this suggestion was a conference held at the Industry's plant on October 22nd, 1936 between representatives of the interested employes and the Operating Officials of the Carrier, but no concrete suggestions were forthcoming from the employes.

In order that the experiment might be given a full and fair trial the Carrier agreed on October 28th, 1938, with our employes to start all engines in the Industry's plant, commencing November 15th, 1938, at the times provided for in the agreements with the several classes of interested employes. This was done with the understanding that if at the end of a ninety (90) day trial period the Carrier, or its employes claim that the starting time provided for in said agreements do not result in efficient and economical operation and in satisfaction to our employes and to the Industry served, then the representatives of the Carrier, representatives of the Firemen, representatives of the Engineers and representatives of the Yardmen will meet with the Carrier nad work out a schedule of starting times best suited for meeting the special requirements of the Industry. This understanding was arrived at through correspondence and conferences with the Yardmen—their representatives having urged that such a trial be made, and by telephone conversation with General Chairman of the Firemen and General Chairman of the Engineers. As having a very direct bearing on the understanding of the representatives of the employees regarding the starting time of engines prior to November 15th, 1938, the following is quoted from the letter agreement covering this, and other

subjects, written October 28th, 1938, by President Rogers of the Carrier to General Chairman Williams of the B. of R. T. representing the Yardmen and accepted by him for the Yardmen as of October 31, 1938.

Case No. 5—Labor Board Docket No. 3537—Starting time of switch engines in Whiting S. O. Yard."

"Settled by agreement that the starting times, for a ninety day trial period commencing November 15th, 1938, shall be the time provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employes claim that the starting times as fixed in Article 6 do not result of efficient and economical operation and in satisfaction to our employes and to the industry served, then representatives of the Railway Company and representatives of the Yardmen, and representatives of the Engineers and representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry."

As a result of this agreement this case was withdrawn from the Board by a letter dated October 31st, 1938, to Secretary McFarland, signed jointly by President Rogers and General Chairman Williams of the Yardmen. Receipt of this letter was acknowledged by Secretary McFarland of the National Railroad Adjustment Board, First Division, on the same day, October 31st, 1938. This complaint of the Yardmen is referred to not because it is claimed that any agreement with the Yardmen would be binding upon the Firemen, but because is distinctly sets forth the understanding of both parties of the situation which existed prior to November 15th, 1936, and in the case filed by the Yardment there is no contention that such an understanding was not in force but only a request for an order from the Board requiring the Carrier for the future to start engines as provided in the schedule. An amicable agreement having been reached with the Yardmen with respect to a trial period, there was no necessity for the continuance of the case. The meeting on July 24th, 1934, having been a joint conference attended by representatives of the Firemen, Engineers and Yardmen the understanding of all must have been alike.

There was no violation of Article 10 of the Firemen's

Agreement because the waiver of the provisions of this Article was specifically agreed to by representatives of the Firemen, and while there were some departures from the starting time of yard engines provided in the Article the situation was thoroughly discussed and was understood by all interested.

The Carrier's submission covers that portion of the claim which refers to an additional day at time and one-half at the regular daily rate from August 26th, 1934, for firemen employed in the Standard Oil Plant at Whiting, Indiana, but it has no knowledge of what is meant by the concluding paragraph of the Statement of Claim, which reads—

"Claim is further made that any analogous violations of starting time rules which may have occurred subsequent to August 26th, 1934, shall be adjusted in accordance with the above claim."

Therefore, if consideration is to be given to that portion of the Statement of Claim, the Carrier insists that it must have further and more detailed information as to just what is meant by—"analogous violations of starting time rules."

The Carrier respectfully requests that this claim be denied.

Oral hearing is requested and an opportunity to present witnesses.

All data submitted in support of the Carrier's position was presented to the employes and made a part of the particular question in dispute.

(Exhibits not reproduced.)

Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The record shows instances in which claimants were required to start work at hours other than those agreed upon in Article 10 (B). This constituted a violation of said article. In each instance the claimant is entitled to an adjustment of compensation as though he had in fact

been started to work not later than the next preceding hour fixed in Article 10 (B) for starting work.

Award.

Claim disposed of per Findings.
National Railroad Adjustment Board,
By Order of First Division.
Attest:(Sgn.) T. S. McFarland,
Secretary.

Dated at Chicago, Illinois, this 6th day of September, 1940.

62 And on, to wit, the 6th day of February, 1941, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Memorandum of Reply to Plaintiffs' motion to Strike, etc. in words and figures following, to wit: Filed Feb. 6, 1941.

63 In the District Court of the United States.
* * (Caption—2341) * *

MEMORANDUM OF REPLY TO: I. PLAINTIFFS' MOTION TO STRIKE; II. COUNTER-AFFIDAVIT OF PLAINTIFFS; III. PLAINTIFFS' ANSWER RELATING TO "RES ADJUDICATA AND RELEASE" SET FORTH IN DEFENDANT'S MOTIONS; IV. MEMORANDUM BRIEF IN ANSWER TO DEFENDANT'S MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT.

In this reply defendant will consider the various procedural and substantive matters submitted to this Court for decision in the order as hereinabove set forth as subdivisions to the title of this memorandum.

I.

Reply to Plaintiffs' Motion to Strike.

On December 24, 1940, plaintiffs filed a motion to strike defendant's motion to dismiss the complaint and the affi-

davit of the defendant in support of its motion because
64 the motion to dismiss set forth additional evidentiary matters not alleged in the complaint. The plaintiffs stated in their motion to strike that these evidentiary matters should be set forth by the defendant in a responsive pleading and not in an affidavit in support of a motion to dismiss. Subsequently, the defendant filed a motion for summary judgment and in support thereof relied upon the facts set forth in the affidavit in support of defendant's motion to dismiss. When the matters came for hearing before this Court on January 13, 1941, this Court entered a rule upon the plaintiffs to file counter-affidavits.

71 **II.**

Reply to Counter-Affidavit of Plaintiffs.

Four of the twenty-three plaintiffs subscribed their names to the counter-affidavit which they stated was made "for ourselves and the other plaintiffs." We respectfully submit that an individual plaintiff cannot make an affidavit for another individual plaintiff in a case which seeks to impose a liability for each individual plaintiff against the defendant.

The facts set forth in the counter-affidavit, even if true, which the defendant does not admit, do not present triable issues of fact. All of the facts set forth in the defendant's affidavit and the exhibits attached thereto are expressly admitted by the plaintiffs. The only substantive question presented to this Court for determination is whether the facts set forth in the affidavit of the defendant and the exhibits, when considered with the facts set forth in the plaintiffs' affidavit, present a question of law upon which this Court shall render judgment for the defendant.

The facts set forth in the plaintiffs' counter-affidavit are immaterial facts and show clearly that there is no genuine factual issue.

The counter-affidavit admits (Paragraph 11) that the officials of the local lodge of the Brotherhood of Railroad Trainmen of which the plaintiffs were members "were
72 authorized to present to the officials of the company, the plaintiffs' grievance against that company for the failure and refusal to abide by their obligations as set forth in Article 6* * *." Thereafter, the affidavit states

the "officials of the B. of R. T. were then authorized to file a complaint with the National Railroad Adjustment Board to enforce the terms thereof and compel the defendant to perform thereunder."

Pursuant to this express authority, as shown by the counter-affidavit of the four plaintiffs, the General Chairman of the Grievance Committee of the Brotherhood of Railroad Trainmen, the designated representative of the plaintiffs for collective bargaining purposes, filed the first complaint before the National Railroad Adjustment Board on November 23, 1936, as shown by Exhibit "A" attached to defendant's affidavit in support of its motion to dismiss. This complaint on November 23, 1936, was assigned Docket No. 3537 by the Adjustment Board. (Exhibit "B" attached to defendant's affidavit.)

Subsequently, on October 31, 1938, the Grievance Committee of the Brotherhood of Railroad Trainmen and the President of the defendant railway company compromised this claim. This compromise was made in accordance with the duty imposed upon the carrier and the designated representative of its employees by the provisions of the Railway Labor Act (45 U. S. C. A. § 152, Paragraphs First and Second) requiring the parties "to make and maintain agreements concerning rates of pay, rules and working conditions and to settle all disputes, whether
73 arising out of the application of such agreements or otherwise * * *." The signatures of the designated representatives of the employees are set forth on page 8 of Exhibit "C" attached to the affidavit filed by the defendant in support of its motion to dismiss. The counter-affidavit of the plaintiffs admits the execution of this document by the Chairman and Secretary of the Grievance Committee of the Brotherhood. This compromise agreement was not intended to be a partial settlement. The compromise agreement expressly provided otherwise. The intention of the parties as expressed in the agreement is clear and unambiguous. We repeat the final paragraph of the compromise agreement:

"We have by this letter given you a complete resume of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employes whom you represent and have proposed in this letter a very liberal disposition of all of the cases involved. The settlements proposed are predicated on a complete settlement and with-

drawal of all cases now pending either before the Board, or under discussion with this office except Case No. 4, which it is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement."

This letter of compromise dated October 28, 1938, and accepted by the officials of the Brotherhood on October 31, 1938, is a typical example of collective bargaining as practiced daily throughout the United States by rail-
74 roads and designated representatives of employees.

In this letter (Exhibit "C" attached to the affidavit filed by the defendant in support of its motion to dismiss) disposition was made of thirty-eight cases, some of which were pending before the Adjustment Board and some of which were not filed by the Brotherhood before the Adjustment Board. All cases related to rates of pay, rules and working conditions of employees of the defendant and cases numbered 8, 9, 10, 11, 13, 14, 15, 16, 17, 23, 24, 36, 38, 39, 40, 41, 42, 44, 45, 50 and 54 (a), (b), (c) and (d) related to time claims for the payment of money varying from the amount of $7.94 to some individuals to the amount of $951.30 to another individual (Case 17). More than seventy-two individuals, employees of the defendant, received money or time claims as a result of this compromise agreement executed by the officials of the Brotherhood on October 31, 1938. Included among the individuals who were seeking money from defendant at this time were H. M. Alderman (Case 43), J. M. Harr (Case 43), J. Harr (Case 45), H. Alderman (Case 50), and T. J. Murray (Case 50), plaintiffs herein.

After the execution of this compromise agreement the General Chairman of the Grievance Committee of the Brotherhood of Railroad Trainmen executed a letter dated October 31, 1938, addressed to the Adjustment Board (Defendant's Exhibit "D" attached to the affidavit in support of its motion to dismiss) advising that "The following cases have been settled and we, therefore, jointly

request that they be withdrawn from the Docket of the Board. * * * National Railroad Adjustment Board Docket No. 3537. Complaint of employees that yard engines
75 in S. O. Company plant are being started at times other than those provided in Article 6 of the Yardmen's Agreement * * *." That letter (Exhibit "D") also is a typical example of collective bargaining as daily practiced throughout the United States by carriers and designated representatives of employees. This collective bargaining, practiced for many years by the defendant and the designated representatives of the employees, is required by the Railway Labor Act of 1934.

77 The plaintiffs and the defendant admit that the Brotherhood of Railroad Trainmen is the designated representative of the plaintiffs within the meaning of the Railway Labor Act. The four plaintiffs who executed the counter-affidavit admit that the "officials of the B. of R. T. were then authorized to file a complaint with the National Railroad Adjustment Board" to enforce the provisions of Article 6 of the agreement of the defendant with its employees concerning rules, rates of pay and working conditions. With that authorization inheres the power to compromise.

The contentions made by the designated representatives of the employees in the complaint filed before the Adjustment Board on November 23, 1936, were not adverse to the plaintiffs. The contentions made prior to the compromise settlement executed by the Brotherhood officials on October 31, 1938, (defendant's Exhibit "C" attached to the affidavit filed in support of defendant's motion to dismiss) were not adverse to the plaintiffs. The contentions of the Brotherhood officials sought to benefit the plaintiffs in the case at bar. Any order entered by the Board finding that defendant had violated Article 6 of its agreement would have been a precedent for future orders of money claims.

79 The exhibits attached to the affidavit filed by the defendant in support of its motion to dismiss and incorporated by reference in its motion for summary judgment (Exhibits "A" to "F" inclusive) show collective bargaining with the General Committee of the Brotherhood of Railroad Trainmen, the designated representatives of the plaintiffs, during the period beginning in 1934 and ending in 1940. The affidavit of the four plaintiffs,

if given substantive legal effect, would require the defendant to cease collective bargaining.

81 That portion of Rule No. 3 quoted in Exhibit "A" attached to the plaintiffs' counter-affidavit does not apply to the compromise settlement executed by the Brotherhood officials on October 31, 1938. Clearly, it applies to an agreement relating to rules, rates of pay and working conditions. Such an agreement had been made in the case at bar. The plaintiffs predicate liability on an alleged violation of Article 6 of that agreement.

Rule No. 7 quoted in Exhibit "A" provides that the Grievance Committee "shall have power to alter, amend, add to or strike out * * * any part or all of any complaint or claim submitted to the committee * * * A general grievance committee may authorize their chairman to handle all grievances received from local lodges with the management for settlement. * * *" Such broad powers, granted to the Grievance Committee by Rule No. 7 permit the Committee to make an effective settlement of the dispute

82 regarding Article 6 in the case at bar. That settlement was executed by the Committee on October 31, 1938.

Rule No. 8½ quoted by the plaintiffs in Exhibit "A" attached to the counter-affidavit has no material relation to the case at bar. In like manner, general Rule No. 5, partially quoted in the same exhibit, has no material relation to the case at bar for the reason that the plaintiffs admit in their counter-affidavit that the officials of the Brotherhood "were then authorized to file a complaint" before the Board and to "enforce the terms" of Article 6.

The plaintiffs omitted to quote in Exhibit "A" attached to their counter-affidavit that portion of Rule No. 10 which provides:

"Whatever action may be taken by the general grievance committee * * * shall be law to the lodges on that road until the next meeting of the board of appeals, and if any member refuses to vote or abide by the action of such general grievance committee or board of adjustment he shall be expelled from the Brotherhood for violation of obligation."

The remainder of Rule No. 10 provides an appeal for any member of the Brotherhood who is not satisfied with the action of the Committee. Whatever action the plaintiffs in the case at bar may have for the alleged violation of rules of the Brotherhood should be taken before the various tribunals existing for that purpose created by the

Brotherhood of Railroad Trainmen. This Court lacks jurisdiction.

83 For the convenience of the Court there is attached hereto as defendant's Exhibit "G," a document which counsel for the defendant are informed and believe, and so state the fact to be, is a copy of the "Constitution and General Rules of the Brotherhood of Railroad Trainmen" amended 1931, and in force and effect at the time of the settlement agreement executed October 31, 1938. There is also attached hereto as defendant's Exhibit "H," a copy of the agreement between the defendant and its yardmen relating to rules and rates of pay, effective January 1, 1927, containing Article 6, for the alleged violation of which plaintiffs predicate liability.

The counter-affidavit of four of the twenty-three plaintiffs, in Paragraph 21 refers to an award made by the National Railroad Adjustment Board on September 6, 1940, Docket No. 6788, in the case of *Brotherhood of Locomotive Firemen and Enginemen* v. *Elgin, Joliet and Eastern Railway Company.* Obviously, that case refers

84 to a different "craft or class" than the Brotherhood of Railroad Trainmen. The counter-affidavit of the four plaintiffs (Paragraph 21) states "that the facts in their claim were identical with the facts under which the claim filed by C. H. Williams * * * ". The counter-affidavit seeks to impress the Court that the facts in the Brotherhood of Locomotive Firemen and Enginemen case decided by the Adjustment Board were the same as the facts in the Brotherhood of Railroad Trainmen case decided by the Adjustment Board. There is obvious error, if such was the intent.

In the Brotherhood of Locomotive Firemen and Enginemen case, Docket No. 6788 (Exhibit "B" attached to the plaintiff's counter-affidavit) there was no negotiated compromise agreement. There was no document similar to the negotiated compromise agreement in the case at bar executed by the officials of the Brotherhood on October 31, 1938.

85 IV.

REPLY TO PLAINTIFFS' MEMORANDUM BRIEF IN ANSWER TO DEFENDANT'S MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT.

The "Statement of Facts" in the plaintiffs' memorandum brief criticizes the statement of defendant that "the starting time of yard crews of the Standard Oil Company performing the work prior to July 27, 1934, were not the same as the starting times of yard crews of the defendant." This is clearly shown in the "Employees' Statement of Facts" in Docket No. 7324 of the National Railroad Adjustment Board, defendant's Exhibit "F" attached to the affidavit in support of the motion to dismiss.

In like manner, an agreement to waive Article 6 of the yardmen's agreement is admitted by the employees in the "Statement of Claim" and "Position of the Committee" in the same award (defendant's Exhibit "F").

The defendant admits that the complaint in Docket No. 7324, resulting in the award of the National Railroad
86 Adjustment Board of September 6, 1940, was filed before the Board on May 18, 1939, as stated in the last sentence of the affidavit attached to defendant's motion to dismiss.

The plaintiff's in their brief admit that, other than the three criticisms hereinabove answered in this reply in the three preceding paragraphs, the defendant's "statement of facts is correct insofar as it goes."

103 Wherefore, the defendant prays that its motion to dismiss may be granted and that judgment may be entered for the defendant.

Respectfully submitted,

Harry I. Allen,
Paul R. Conaghan,
Attorneys for defendant, Elgin, Joliet and Eastern Railway Company.

106 **Exhibit "I"**

Letterhead—National Railroad Adjustment Board—

May 18, 1939

Mr. S. M. Rogers, President
Elgin, Joliet & Eastern Railway Company
Chicago, Illinois

Mr. A. F. Whitney, President
Brotherhood of Railroad Trainmen
Cleveland, Ohio

Gentlemen:

Our Docket Numbers 7324 to 7328, inclusive, have been assigned as indicated to the following Elgin, Joliet & Eastern Railway Company—Trainmen's cases, which were submitted ex-parte at the instance of General Chairman Williams, representing the Brotherhood of Railroad Trainmen on that railroad:

7324—"Claim for one day's pay at time and one-half for each foreman and each helper * * * in violation of the fixed starting time provided for in Article 6 of the Yardmen's Agreement."

7325—"Claim of A. D. Fitch, Yardman, South Chicago Yard, for 155 days from February 14, 1938 to July 19, 1938, * * *"

7326—"Claim for one additional yard day at yard helper rate of pay for each of three (3) yardmen, * * * November 1, 1938 to February 7, 1939, inclusive. * * *"

7327—"Claim of Joe Grennes, Yardman, Gary Tin Plate Mill Yard for 14 days' pay at yard helper's rate, June 28, and 29, July 1, 5, 6, 7, 8, 9, 11, 12, 15, 17 and 18, 1938. * * *"

7328—"Claim for B. A. Smith, Foreman, S. F. Johnson and L. Clark, Helpers, * * * September 23, 1938. * * *"

These cases are assumed to be complete and nothing will be added thereto prior to the date of hearing thereon. It should be understood, however, that any argument presented to the Division at the hearing will be confined to

matters incorporated in the submissions, and introduction of evidence at the hearing is foreclosed.

If argument is prepared in form of written brief, copies thereof shall be exchanged between the parties prior to the date of hearing.

107 At the direction of the Division I am sending to the Management copies of the Employees submissions, and to the general Chairman copies of the Management's submissions. This is being done in order that both parties may have an opportunity to study the submissions prior to the date set for hearing.

Yours very truly,
T. S. MacFarland,
Secretary.

TSM:WB
cc:Mr. C. H. Williams

(Letterhead of National Railroad Adjustment Board.)

April 19, 1939.

Mr. S. M. Rogers, President,
Elgin, Joliet & Eastern Railway Company,
208 South La Salle Street,
Chicago, Illinois.

Dear Sir:

In letter of April 18, 1939, Mr. C. H. Williams, General Chairman representing the Brotherhood of Railroad Trainmen on your railroad, served notice of his intention to file ex parte submissions in the five claims which are fully explained under the headings "Statement of Claim," in his letter, a copy of which it is indicated was sent to you.

You are requested in accordance with Circular No. 1 of October 10, 1934, to file by May 19, 1939, fifteen copies of the Management's submissions in these five (5) ex parte cases.

It is assumed that the statements of claim shown in the submissions of both the Management and the Committee will be identical with those shown in the notice letter; and that as provided in Circular No 1 the submissions from both the Carrier and Committee will affirmatively show that all data submitted in support of their respective

positions has been presented each to the other and made a part of the particular question in dispute.

Very truly yours,
T. S. McFarland,
Secretary.

Endorsed: Chicago President's Office Apr 20, 1939. Railway Company, Elgin, Joliet & Eastern.
TSM/ms
cc: Mr. A. F. Whitney
Mr. S. H. Williams

109 (Letterhead of General Grievance Committee.)

April 18, 1939.

Mr. T. S. McFarland, Secretary,
National Railroad Adjustment Board,
1908 Consumers Building, 220 South State Street,
Chicago, Illinois.

Dear Sir:

Acknowledging receipt of your letter of the 17th calling my attention to an error in notification to the carrier in my offer of submissions to your Board, I am rewriting the letter of notice to conform to the submissions in each case and sending a copy of this letter to carrier.

Statement of Claim: Claim for one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article No. 6 of the Yardmen's Agreement of the Elgin, Joliet & Eastern Railway Company, effective January 1, 1927, and applicable to Whiting (Standard Oil Company) Yardmen, July 27, 1934, from dates of August 27, 1934, until November 14, 1938, inclusive.

Note: Claim made thirty (30) days after agreement was made effective on account of committees agreeing to permit this length of time for yardmen to become accustomed to the changes being made.

Statement of Claim: Claim of A. D. Fitch, Yardman, South Chicago Yard, for 155 days from February 14, 1938, until July 19, 1938, inclusive, on account of being cut off of the board and the Elgin, Joliet & Eastern Railway

Company retaining in the service during that time, a junior yardman.

Statement of Claim: Claim for one additional yard day at yard helper rate of pay for each of three (3) yardmen, assigned as "special switchmen" in Gary Mill Yard to hot cinder crew assignments, from date of November 1, 1938 until February 7, 1939, inclusive, account of requirilng each yardman so assigned to work on more than one assignment during his eight (8) hour tour of duty each day between and including those dates.

110 Claim for one day at yard helper rate of pay for three extra yardmen who stood first out each day from November 1, 1938 until February 7, 1939, inclusive, who were deprived of work on account of the carrier failing to assign yardmen to the vacant assignments instead of requiring the "special switchmen" to work on more than one assignment.

Statement of Claim: Claim of Joe Grennes, Yardman, Gary Tin Plate Mill Yard for 14 days pay at yard helper's rate, June 28th, and 29th, July 1st, 5th, 6th, 7th, 8th, 9th, 11th, 12th, 15th, 16th, 17th, and 18th, 1938, on account of using Mr. M. R. Joyce, General Yardmaster, Kirk Yard, in addition to his own duties, to fill the place of Mr. W. R. Brown, Assistant General Yardmaster, Gary Tin Plate Mill Yard, who was off on his annual vacation.

Statement of Claim: Time claim for B. A. Smith, Foreman, S. F. Johnson and L. Clark, Helpers, Whiting Yard, for one yard day at yard rate of pay account of being required to go from their yard in the Whiting (Standard Oil Company) Company plant into the B. & O. C. T. Railway classification yard for a car on date of September 23, 1938.

Oral hearing desired.

Yours truly,
C. H. Williams,
General Chairman, B. of R. T. E. J. & E. System.

copy to:
Mr. S. M. Rogers, President,
E. J. & E. Railway Company,
208 South LaSalle Street,
Chicago, Illinois.

123 And on, to wit, the 19th day of June, 1941, there was filed in the Clerk's office of said Court a certain Report of Proceedings, in words and figures following, to wit:

124 * * (Caption—2341) * *

Report of Proceedings at the hearing of the above entitled case, before the Honorable John P. Barnes, Judge of said court, on the 10th day of February, A. D. 1941.

Present:

Mr. John H. Gately, appeared for plaintiffs;

Messrs. Knapp, Allen & Cushing, by Mr. Paul R. Conaghan, appeared for defendant.

Mr. Gately: If your Honor please, I doubt if your Honor has had the time to read all of the cases that were cited in the short time that the briefs have been on file.

The Court: I read all the parts of those cases quoted in your briefs.

125 Mr. Gately: There were certain parts in some of the cases that were not quoted; for instance, the Rennsler case of Iowa, which was too long for quotation, and, as I suggested in my brief, if your Honor wishes a complete summary of the whole question of labor and carrier insofar as railroad employees are concerned, I think it is very well set forth in that case.

But getting down to the present case, if your Honor please, as I suggested in the brief, if you will look at the letter that they seem to wish to hang their hat on, as I might say, in this case, the letter sets up fundamentally certain claims—I believe there are sixty-one of them, claims and grievances. Now we distinguish between claims and grievances, claims being claims for money due and owing to the employees, and grievances being the failure of the railroad to live up to the terms of its agreement or its contract.

Now the grievance that was presented, and upon which they seek to have this letter act as a release was the only thing that was pending before the National Railroad Adjustment Board at that time, and from the wording of

126 the letter, if your Honor please, I believe your Honor will agree that it would be claims that they seek to have a release given on, so loosely set up by the—

The Court: I thought that letter was quite full and complete, and so did the mediation board, or whatever it calls itself.

Mr. Gately: Well, if your Honor please, that letter, if analyzed, only releases the grievance of the—well, let's get the letter, if your Honor please. The case involved here is case No. 5 set up in the letter, and sets out the starting time of switch engines in the Whiting Standard Oil Yard. There is nothing mentioned in that letter as to any individual members' claims, or any individual's claim of any of the plaintiffs before your Honor. Now that goes back to the last paragraph by setting up all these claims and grievances.

"The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending—"

Well, the only case pending was the grievance, if your Honor please.

"—either before the board, or under discussion with this office—"

127 Now we can only take words at their ordinarily accepted meaning. I wish to submit that that was the only thing that was pending, the failure of the railroad to live up to the terms of that agreement.

Now counsel devoted some time in his brief to the motion to dismiss. I set up in my reply brief that I would consider his motion to dismiss a motion for a summary judgment, and therefore urge no argument on it. Counsel devoted four or five pages to arguing the question.

He also sets up that there are no issues of fact. I believe if your Honor will read over the brief carefully, I believe I suggested six separate issues of fact. He seeks to slide over them by stating that they are not material. I think every one of those issues of fact set up there are very material. They go right to the heart of this lawsuit. He stated that we do not cite any facts. We cite all the facts set forth. Now, if your Honor looks at the brief you will see I said "We believe that the facts set forth plus the affidavit of facts filed herein completely set forth the issues." He seems to want to ignore the facts set up in the affidavit.

128 Now on this motion, the question as submitted to the Court is not a matter of law insofar as the legal principles alone are concerned. The question before this Court is set out in *Gordetsky* v. *Shell* in the Circuit Court

of Appeals, 101 Fed. 2nd, 760, in an action for malicious prosecution, where the plaintiff's affidavit directly controverts defendant's affidavit and supports the allegations of the complaint, it is error for the Court to dismiss the complaint. I wish to submit, if your Honor please, that the affidavit that is filed herein as the counter-affidavit to the plaintiffs' directly and unquestionably controvert the allegations of fact they set up there, and creates, if your Honor please, issues of fact diametrically opposed, by our affidavit and their affidavit, that can only be tried by a jury.

The Court: What is the first one?

Mr. Gately: The first fact, if your Honor please, is whether or not there was any authority in Mr. Williams to present any claim—

The Court: Oh, well, I think, as counsel said, it is ostensible authority. I think they are right about that.

Mr. Gately: If your Honor please, you can't dis-
129 regard all the cases we have quoted here. A union official cannot—and I have quoted, I believe, eight or ten cases which hold directly that union officials cannot waive the individual rights of its members. Now counsel seeks to evade that by stating that those cases were decided prior to the Act in 1934. Now, if your Honor please, the Act of 1934 was an amendment and there is no substantial change as to any of the acts. Furthermore, the United States Circuit Court of Appeals in I. C. R. R. Co. *vs.* Moore quoted several of those cases that I have cited. Now we can't disregard all the courts of the land, and every court in this land, with the exception of the Smith case, if your Honor please, has decided unequivocally down through the whole history of the labor movement that a union official cannot waive the individual rights of its members.

Now, if your Honor please, I think it is very adeptly stated in the Stephenson case, if your Honor please, what could be the result—that isn't the case. There is one case that cited in effect what would be the result if the individual members of a union—in an agreement between the union and the carrier the indivdual rights would
130 be caught between the millstones, and every individual's rights could be trampled on and waived entirely.

Now all of these cases that I have cited, if your Honor please, were under the Act, the Railway Labor Act of 1926—

The Court: What do you think would have happened had the ruling of the National Railroad Adjustment Board of September 6, 1940, been the opposite of what it was?

Mr. Gately: Had it been the opposite and given an award to these employees I would still say that it was absolutely of no effect. However, I say also that the employees, had they been apprised of it, might have ratified it, but I still say it would have been void. That case was void absolutely without any reference to these employees and without any authority from these employees, if your Honor please, and Williams, the man who filed it, made the statement he took it upon himself to file that, and this carrier knew of that, if your Honor please.

If there is anything at all insofar as jurisdiction and the rights of parties is concerned, I think this is one of the most sublime cases in which it could be tried.

131 In other words, if your Honor please, suppose the members of the union—not the members but the officers of the union decided that they wanted to sell out these men, and they filed a claim that would absolutely abrogate a very vast amount of money that might become due under the terms of a contract, they did it without the knowledge of the members—well, if your Honor please, the Brotherhood of Railroad Trainmen have certain rules and regulations that have to be followed. And this defendant knew it. As a matter of fact, it knew it so well that it appended to its brief the constitution as an exhibit. Now the exhibits are all right here, your Honor. You have the constitution and the schedule, but I didn't think it was well to set up the whole blooming thing as an exhibit, if your Honor please, only the pertinent parts.

Now, then, the defendant knew of all these rules and regulations. They say "ostensible authority." Your Honor mentioned it. Now authority is either absolute or there is no authority. There is no ostensible authority. Either I have authority as an agent of you to go out and sell your house or I haven't authority.

132 The Court: Either you have the authority of your client to come in here or you haven't his authority.

Mr. Gately: Absolutely.

The Court: But whether you have or not, you still filed the claim.

Mr. Gately: If your Honor please, getting back to the railroad, where there are millions of dollars involved, some official of the Brotherhood goes off half cocked—

The Court: What I said was right. It may not apply to an officer of a labor union.

Mr. Gately: That is correct, if your Honor please, that is correct, but for that reason I think the Court should be very careful in giving cognizance to ostensible authority. They either have it or they haven't got it.

The Court: I think it is quite important that this right of this National Railway Adjustment Board be sustained. I think that is important. It is vitally important to your clients even when their interests are adversely affected.

Mr. Gately: Well, if your Honor please—

The Court: I am not claiming that we are starting to try the case over again, but I think it is quite important
133 to society that the authority of that National Railroad Adjustment Board be sustained.

Mr. Gately: I think it is except, if your Honor please, that the act under which they are operating is absolutely unconstitutional. There is no question of it, if your Honor please. It gives a right of review to the employer, but it gives no right of review to the employee, and that is a direct violation of the fifth amendment to the constitution, and your Honor knows it. If you rule the Railroad Adjustment Board's award is final, I have cited several cases to your Honor which show absolutely that the award is not final. There is another question as to the finality of the award in the act itself if the award concerns a money award.

Now counsel takes exception to my statement that that award contained a money award. I submit, if your Honor please, had the award been granted it would have contained a money award, because as it was presented it concerned a money award. Now, under the act itself that isn't a final award.

Counsel also stated in the brief, if your Honor please, that these employees would have no right under the National Railway Labor Act—and he points it out specifi-
134 cally in two instances in his brief—to deal individually with their employer. I would like to call your Honor's attention to the act itself, which states, title 45, paragraph 152, the fourth subdivision thereof, page 221 of the United States Code:

"Provided that nothing in this chapter shall be construed to prohibit a carrier from conferring with employees individually, or local representatives of employees from conferring with the management."

Now, if your Honor please, that is not as far as we attorneys should go, I believe, in quoting law or quoting statements to the Court, and I suggest that counsel has omitted to read the act. Now this Board and the Brotherhood of Railroad Trainmen are not all powerful. They can't utterly disregard the rights of human beings, individuals, if you will. We are still a democracy, I hope, and, if your Honor please, there are the various cases that have been decided by many courts in this land throughout the country from California down through the Southern States up to Maine, where all of the courts have held that the labor union cannot, must not waive the individual rights of
135 its members; and to give effect to this letter, even if the officials had been authorized to enter into this consent, so-called, or complaint, or proceedings, whatever you call it, before the Board, I would say that he had no right to waive without conferring with every member.

If your Honor please, I might cite this as an example: Suppose an attorney had an opportunity to compromise in a case, and he individually took it upon himself to settle that case. What would your Honor say? He might have the authority under his contract of employment to settle it, but it certainly would be bad policy, and I think he would be severely criticized by the Bar Association and by his fellow attorneys. But here, if your Honor please, the Brotherhood has set up specific rules where there is a compromise. Counsel set up one provision of that exhibit, but I didn't go into the rest of the exhibits because it isn't material; that is, that a committee, not an individual, must waive or compromise any claim.

Now in this case, if your Honor please, the letter of October 28th was signed by C. H. Williams and Mr. S. F. Johnson, I believe the name is. That is not the entire
136 committee. The committee consists of the general chairman, the general secretary and the local chairman. The local chairman had no knowledge of this letter, and I think it is significant.

Now under the rules—and they knew the rules—they say he had ostensible authority. Well, the authority he had was nothing. Only the general committee had authority and the general committee did not sign this letter. Now if your Honor will look you will see there are three members on that committee, and only three have authority to make any compromise.

I don't think there is anything more to say that I haven't

said in the brief, if your Honor please, except as to the cases cited. Incidentally, several of those cases were not decided before the Act of 1934, as counsel stated, and I again wish to call your attention to the fact that the Act of 1926 is the National Railway Labor Act, and the amendments made in 1934 did not change any substantive rights or liabilities or principles under the old Act. The only thing the new Act did, if your Honor please, was to set up a different personnel. Under the old Act the award of the Board was final; there was no provision at all for review. Under
137 the new Act a right of review is given to the carrier but not to the employees.

Now, if your Honor please, counsel has entirely evaded the constitutionality of this act, and I didn't want your Honor to be burdened with the matter of passing on its constitutionality unless it was necessary. Now if you will notice in my brief, your Honor, I state that in the event the Court feels the award is final—and under the cited decisions I cannot see how your Honor can—but in the event you do feel that the award is final, then I may urgently wish you to consider the constitutionality of this act. Under the provisions of the act, as your Honor is aware, if an award is granted and the carrier doesn't see fit to carry it out after an order has been entered thereunder, the petitioner may appear before the United States District Court here and seek to have it enforced. That appearance or that trial before the Court is a trial de novo opening up the whole case, and the carrier can put in any defenses. He says the award of the Board is termed only prima facie evidence, and under the procedure I submit, if your Honor please, the carrier is the only one entitled to a review. A de-
138 feated employee, as many of these cases hold that I have cited to your Honor, cannot thereby appeal, and there are two or three cases that don't come out directly—the Des Moines case states by inference where the employer has questioned the constitutionality of this act the Court said: "You are certainly not aggrieved. If anyone is aggrieved it is the employee."

I think that is all, if your Honor please.

The Court: If I remember correctly, there was a motion to dismiss and also a motion for summary judgment, is that correct?

Mr. Conaghan: Yes, sir.

Mr. Gately: If your Honor please, under the law a motion to dismiss with affidavits attached should be con-

sidered as a motion for summary judgment, and that is the way I stated in my brief I would consider it, and I think your Honor has read the brief.

The Court: Am I correct in my understanding of the complaint that these various switchmen seek a day and a half pay for every day that they are required to start other than at the time—

Mr. Gately: That is correct, Judge.

The Court: Am I correct in my understanding that that they were paid for the time they actually worked?

139 Mr. Gately: That is correct. Under their agreement, if your Honor has the agreement, that penalty is attached.

The Court: Where is that penalty? I couldn't find it.

Mr. Gately: If your Honor please, I was incorrect in that statement, the schedule itself does not set that forth, but it is the universal custom among railroads throughout the United States that on any overtime—I think I set it up in the complaint—that is the penalty.

Decision.

The Court: In this case it appears that some employees of the Elgin, Joliet & Eastern Railway Company, which employees were members of the Brotherhood of Railroad Trainmen, had a controversy in respect of the starting times of yard crews in the Whiting Standard Oil Yard of the Elgin, Joliet & Eastern Railway Company; that that controversy was presented to the National Railroad Adjustment Board by Mr. C. H. Williams, general chairman of some unit of the Railway Trainmen of the Brother-

140 hood of Railway Trainmen: that subsequently a Mr. Rogers, who was president of the Elgin, Joliet & Eastern Railway Company, addressed a letter to Mr. Williams as general chairman of the Brotherhood of Railway Trainmen, which letter related to the compromise settlement of a large number of controversies pending between the Brotherhood and the Elgin, Joliet & Eastern Railroad Company. One of those matters was case No. 5, Labor Board Docket 3537, starting time of switch engines in Whiting Standard Oil Yard. That letter says:

"Settled by agreement that the starting times, for a ninety day trial period commencing November 15th, 1938, shall be the times provided for in Article 6 of the Yard-

men's Agreement instead of the starting time heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employees claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in satisfaction to our employees and to the industry served, then representatives of the Railway Company and representatives of the Yardmen, and representatives of the
141 Engineers and representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry."

The last paragraph of that letter says:

"We have by this letter given you a complete resume of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employees whom you represent and have proposed in this letter a very liberal disposition of all the cases involved. The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending either before the board, or under discussion with this office except Case No. 4, which it is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement."

That letter is signed by Mr. Rogers as president, is dated October 28, 1938, and below Mr. Rogers' signature appears "Accepted for the Yardmen: October 31, 1938,
142 C. H. Williams, General Chairman, B. of R. T. S. F. Johnson, Secretary, B. of R. T."

Subsequently the Brotherhood of Railway Trainmen filed another claim with the National Railway Adjustment Board, First Division. The claim says:

Claim for one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article No. 6 of the Yardmen's Agreement of the Elgin, Joliet and Eastern Railway Company, effective January 1, 1927, and applicable to Whiting (Standard Oil Company) Yardmen, July 27, 1934, from dates of August 27, 1934, until November 14, 1938, inclusive."

Now in that matter the board makes reference to this letter from which I have quoted and made the following findings—this is under date of the 6th day of September, 1940:

"Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and
143 employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"The evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28th, 1938, accepted by employees October 31, 1938.

Award

"Claim denied per Findings.

National Railroad Adjustment Board
By Order of First Division."

Subsequently the employees filed this suit. There is this question of jurisdiction. The allegation of the complaint is, as I recall, that about half of the—

Mr. Gately: Plaintiffs are residents of Indiana. That is correct, Judge.

The Court: That more than half of the plaintiffs herein are residents of the State of Indiana, and the defendant herein is a corporation created under the laws of the
144 State of Illinois. I take it that if these plaintiffs have claims, each one has a claim, and that there would remain a cause of action and a suit having parties of diverse citizenship even if we caused part of them to be dismissed out, so I am spending no more time on that question.

The great question in the case is as to whether or not this decision of the National Railroad Adjustment Board, Division 1, is an adjudication of the matter as between the parties. On behalf of the plaintiffs it is contended that it is not such an adjudication. On behalf of the defendant it is contended that it is an adjudication. On behalf of the defendant it is said that these proceedings before the Board

were a very good example and a typical example of collective bargaining, and that the result of collective bargaining proceedings should be binding on all parties if they are represented. Certainly the Brotherhood undertook to represent these plaintiffs in that proceeding before the Board. There was no adverse relationship between the Brotherhood and these plaintiffs in that proceeding before the Board, and I think that the controversy was submitted to the Board, that it had jurisdiction and that it
145 was decided, and that the plaintiffs were represented there and are bound thereby. That is the big question, however, in the case.

I assume this case will go up, and I will be glad to have it go up. I think the ruling of the Adjustment Board was binding upon the plaintiffs as well as upon the defendant, and that it is binding on this court in this proceeding.

There is one other question in the case. Paragraph 8 of the complaint says that under the terms of the agreement aforesaid each of the plaintiffs herein is entitled to pay for an additional day at time and a half at the regular daily rate from August 26, 1934, to and including November 14, 1938, for each foreman and each helper for each day that they were required to work in yard service in the Whiting yard of defendant, in accordance with the established practice among the railroad and employees thereof, and as provided for in Article 6 of said agreement aforesaid. Now there is no such provision in Article 6 of the agreement. I couldn't find it any place therein.

The situation there would be very much like the situation in the dim distant past when I was working as a law
146 clerk. If I had arranged when I started to work that I was to come to work every morning at 9 o'clock and have one hour off for lunch and quit work at 5 o'clock, and if some time, two years after or some short time after I started to work my employer should say "Well, hereafter I am going to ask you to come in at 8:30 and you may go home at 4:30", and I had acquiesced and been paid my wages for two years, then after two years I should say to my employer, "Well, I had an agreement with you that I was to start work at 9 o'clock and you have violated that agreement and I want time and a half for each one of those days"—now I not only couldn't under that state of facts have recovered the time and a half for each one of those days, but I couldn't have recovered anything because I ac-

quiesced. On the facts as I have assumed them I don't think—

Mr. Gately: The men did not acquiesce, if your Honor please. They complained immediately.

The Court: Well, even if they did complain all they could get would be their damages, and what would be their damages? It would probably be one of those measurable in one cent damages and costs.

The motion for summary judgment will be granted.

147 Counsel may present findings of fact and conclusions of law and a judgment order not inconsistent with what the Court has stated.

Mr. Gately: How much time will I have on that, your Honor?

The Court: How much time what?

Mr. Gately: How much time will I have to present that? I would like to get an appeal bond.

The Court: The burden is on the defendant to do that.

Mr. Gately: Well at that time you will set the appeal bond?

The Court: Oh, that will be a nominal cost bond.

Mr. Gately: All right, Judge, thank you.

148 Filed Jun 19 1941. At 3:10 o'clock P. M. Hoyt King, Clerk.

ered 20, 1941. 111 And afterwards, to wit, on the 20th day of February, A. D. 1941, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit: Summary Judgment:

112 In the District Court of the United States.

* * (Caption—2341) * *

SUMMARY JUDGMENT.

The motion of the defendant in the foregoing entitled case for summary judgment for the defendant and against the plaintiffs, pursuant to Rule 56 (c) of the Rules of Civil Procedure, having been presented, and the Court having considered the pleadings, affidavits, exhibits, admissions and briefs filed by counsel for the plaintiffs and

the defendant, and having heard the oral argument of counsel for the plaintiffs and the defendant upon the whole case, and having considered said motion for summary judgment for the defendant and being fully advised in the premises:

The Court hereby finds that the defendant herein is entitled to a summary judgment as a matter of law.

It Is Hereby Ordered, Adjudged And Decreed that the defendant's motion for summary judgment be, and the same hereby is, granted, that the plaintiffs herein do have and recover nothing by their suit, that the defendant, Elgin, Joliet and Eastern Railway Company, go hence without day, and that the said defendant do have and recover of and from the plaintiffs its costs and charges in this behalf expended and have execution therefor.

Enter:

Barnes,
Judge.

Dated: February 20, 1941.

113 And on, to wit, the 17th day of May, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Notice of Appeal in words and figures following, to wit: Filed May 1941.

114 In the District Court of the United States

For the Northern District of Illinois,

Eastern Division.

Harry M. Alderman, *et al.*, *Plaintiffs*, *vs.* Elgin, Joliet and Eastern Railway Company, an Illinois corporation, *Defendants.*	Civil Action No. 2341.

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS UNDER RULE 73(b).

Notice Is Hereby Given that Plaintiffs Harry M. Alderman, F. E. Beccue, G. W. Burley, J. E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. J. Jones, P. F.

McNamara, R. L. Miller, T. J. Murray, J. C. Newman, Edward R. Nolan, H. A. Schroeder, B. F. Smith, M. F. Starkweather, L. Strodtbeck, Ernest Thompson, and Malcolm H. Young, hereby appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the order entered on February 20, A. D. 1941, as follows:

"It is hereby ordered, adjudged and decreed that the defendants' motion for summary judgment be, and the same hereby is, granted, that the plaintiffs herein do have and recover nothing by their suit, that the defendant, Elgin, Joliet and Eastern Railway Company, go hence without day, and that the said defendant do have and recover of and from the plaintiffs its costs and charges in this behalf expended and have execution therefor."

John H. Gately,
Attorney for Appellants Harry M. Alderman, F. E. Beccue, G. W. Burley, J. E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. M. McNamara, R. L. Miller, T. J. Murray, J. C. Newman, Edward R. Nolan, H. A. Schroeder, B. F. Smith, M. F. Starkweather, L. Strodtbeck, Ernest Thompson, and Malcolm H. Young,
134 S. LaSalle Street,
(Telephone: Franklin 4546)

Filed May 17, 1941.

117 And on, to wit, the 17th day of May, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Notice of Filing of Notice of Appeal in words and figures following, to wit:

118 UNITED STATES CIRCUIT COURT OF APPEALS.

• • (Caption—2341) • •

NOTICE OF FILING OF NOTICE OF APPEAL.

To: Messrs. Knapp, Allen and Cushing,
208 South LaSalle Street, Chicago:

You are hereby notified that the plaintiffs-appellants have this 16th day of May, A. D. 1941, filed their Notice of Appeal in the above entitled cause, a copy of which notice of appeal is hereto attached and served upon you.

John H. Gately,
John H. Gately,
Attorney for Plaintiffs-Appellants.

Received a copy of the above notice of filing of notice of appeal, together with copy of Notice of Appeal therein referred to, this 16th day of May, A. D. 1941.

Knapp, Allen & Cushing,
Harry I. Allen,
Paul R. Conaghan.

121 And on, to wit, the 6th day of June, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Statement of Points in words and figures following, to wit: Filed June 6, 1941.

122 In the District Court of the United States.

* * (Caption—2341) * *

STATEMENT OF POINTS.

Plaintiffs-Appellants herewith present the points upon which they claim the court erred:

1. In denying the Plaintiffs' Motion to Strike the Defendants' Motion to Dismiss the complaint, said motion to dismiss containing pleas of res judicata and release.
2. In allowing the Motion of the Defendant for summary judgment.
3. In entering Judgment that the Plaintiffs take nothing by their complaint.
4. In denying the Plaintiffs' right to trial by jury of the issues of fact set up in the complaint; and the issues of fact improperly raised by the Defendants in their motion and affidavit, that is the plea of release therein contained.

Harry M. Alderman, et al.,
By: Gately and Walsh,
By: John H. Gately,
Their Attorneys.

Filed May 17, 1941.

115 And on, to wit, the 17th day of May, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Bond on Appeal in words and figures following, to wit:

116 **Bond of Appeal.**

Know All Men by These Presents: That we, Harry M. Alderman, F. E. Beccue, G. W. Burley, J. E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, T. J. Murray, J. C. Newman, Edward R. Nolan, B. F. Smith, H. A. Schroeder, M. F. Starkweather, L. Strodtbeck, Ernest Thompson, and Malcolm H. Young, as principals, are held and firmly bound unto Elgin, Joliet and Eastern Railway Company, a corporation, in the full and just sum of One Hundred Dollars ($100.00), to be paid to the said Elgin, Joliet and Eastern Railway Company, a corporation, its attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 15th day of May, in the year of our Lord one thousand nine hundred and forty-one.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, Eastern Division, in a suit pending in said Court between Harry Alderman and others, plaintiffs, and Elgin, Joliet and Eastern Railway Company, a corporation, defendant, a decree was rendered against the said Harry Alderman and others, and the said Harry Alderman and others, having filed their notice of appeal in the United States Circuit Court of Appeals for the Seventh Circuit in the Clerk's Office of the District Court to reverse the decree of the aforesaid suit in the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago, within forty days from the date hereof.

Now, the condition of the above obligation is such, that if the said Harry Alderman and others, as listed above and subscribed hereto shall prosecute their said appeal to effect, and shall answer all costs that may be awarded against them if they fail to make their plea good, then the

above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of:
John H. Gately,
Maurice J. Walsh.

Edward R. Nolan,	(Seal)	M. F. Starkweather,	(Seal)
Harry M. Alderman,	(Seal)	P. F. McNamara,	(Seal)
F. E. Beccue,	(Seal)	R. L. Miller,	(Seal)
G. W. Burley,	(Seal)	T. J. Murray,	(Seal)
J. E. Challender,	(Seal)	J. C. Newman,	(Seal)
W. R. Garvey,	(Seal)	B. F. Smith,	(Seal)
J. M. Harr,	(Seal)	H. A. Schroeder,	(Seal)
A. T. Hatfield,	(Seal)	L. Strodtbeck,	(Seal)
R. J. Jones,	(Seal)	Ernest Thompson,	(Seal)
by John H. Gately, *Attorney in Fact.*		Malcolm H. Young, by John H. Gately, *Attorney in Fact.*	(Seal)

Approved May 19, 1941.

Barnes,
Judge.

119 And afterwards, to wit, on the 19th day of May, 1941, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit: Entered May 19, 1941.

120 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2341) * *

Monday, May 19, 1941.

Present: Hon. John P. Barnes, District Judge.

On motion of Plaintiffs' attorneys, It Is Ordered that the Appeal Bond heretofore filed May 17, A. D. 1941, be and the same is hereby approved.

149 And on, to wit, the 20th day of June, 1941, came the Plaintiffs-Appellants by their attorneys and filed in the Clerk's office of said Court their certain Motion in words and figures following, to wit:

Filed June 20, 1941. 150 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2341) * *

MOTION TO EXCLUDE FROM THE RECORD A FROM DEFENDANT'S DESIGNATION OF AD TIONAL PORTIONS OF THE RECORD.

Now come the Plaintiffs herein, by John H. Gately, th Attorney, and move the Court to exclude from the rec in this case now being prepared for appeal by the Cl of this Court and from the Designation of Additional P tions of the Record filed by the Defendants:

1. Item "No. 1, Date Dec. 12, 1940 Motion to dismis etc., which is the same pleading as set up in appellan Designation of Record, in Item 4, Dec. 10, 1940.

2. The Document, "Item No. 2, Feb. 6, 1941 Mem randum of reply to

I. Planitiff's motion to strike.
II. Counter-affidavit of plaintiffs.
III. Plaintiff's answer relating to "Res Adjudicata Release" set forth in defendan's motions.
IV. Memorandum brief in answer to defendant's moti to dismiss and for summary judgment.

and Exhibits G to I, inclusive, attached thereto, filed w the Secretary of Honorable John P. Barnes, Judge of United States District Court."

151 for the reason that said document is not a pleadi but a brief and was not properly filed with the Cl as a pleading and has no place in the law record. T said document is not under oath and purports to cont Exhibits which purport to be copies of letters, but wh Exhibits are not shown to nor supported by affidavit, properly presented for consideration by the Court.

3. Item "No. 3, Feb. 10, 1941 Report of proceedi and opinion of the court on defendant's motion for su mary judgment," for there were no proceedings nor corded proceedings cognizable as a part of the record appeal; and to the knowledge of the Plaintiffs there w no written nor recorded opinion by the Court in this c other than the Order being appealed from, nor was s opinion filed with the Clerk of this Court.

Wherefore, your Plaintiffs pray that said items of d ignation by the Defendants herein as aforesaid will

excluded from the record on appeal herein and the Defendant's designation of additional portions of the record be stricken.

John H. Gately,
Attorney for Plaintiff.

152 And afterwards, to wit, on the 20th day of June, A. D. 1941, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit: Entered June 20, 1941.

153 In the District Court of the United States.
* * (Caption—2341) * *

ORDER.

This cause coming on to be heard upon the motion of the Plaintiffs herein to exclude from the record on appeal, and from the Defendant's designation of additional portions of the record, certain items set up in said motion, and it appearing to the court that said Defendants have agreed to exclude Item No. 1 of their designation of the additional portions of the record, and it appearing that all parties entitled thereto having received notice thereof and after a hearing thereon.

It Is Ordered that the motion of the plaintiffs to exclude Items numbered 2 and 3 of Defendant's designation of additional portions of the record is hereby overruled without prejudice.

Enter:

Barnes,
Judge.

154 And on, to wit, the 6th day of June, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Designation of Contents of Record on Appeal in words and figures following, to wit:

Filed June 6, 1941. 155 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2341) * *

DESIGNATION OF CONTENTS OF RECORD OF APPEAL.

No. Date

1. Nov. 19, 1940. Complaint.
2. Nov. 19, 1940 Summons.
3. Nov. 19, 1940. Security for costs.
4. Dec. 10, 1940. Motion of defendant to dismiss and affidavit in support.
5. Dec. 24, 1940. Notice and motion to strike defendant's motion to dismiss.
6. Dec. 24, 1940. Order on motion of plaintiff to strike.
7. Jan. 13, 1941. Motion for summary judgment.
8. Jan. 29, 1941. Reply to motion setting up pleas of *res adjudicata* and release on a motion for a summary judgment.
9. Jan. 29, 1941. Counter affidavit to affidavit in support of motion to dismiss.
10. Feb. 20, 1941. Order summary judgment of dismissal of complaint.
11. May 17, 1941. Notice of appeal to United States Circuit Court of Appeals.
12. May 17, 1941. Bond on appeal.
13. May 17, 1941. Notice of filing notice of appeal.

156 14. May 19, 1941. Order appeal bond heretofore filed herein May 17, 1941 approved.

15. June 6, 1941. Statement of Points.

John H. Gately,
Maurice J. Walsh,
Attorney for Appellants,
134 S. LaSalle Street, Chicago
Telephone: Franklin 4546.

Received a copy of the foregoing Designation of Contents of Record on Appeal this 6th day of June. A. D. 1941.

Knapp, Allen and Cushing,
Attorneys for Appellee.

157 And on, to wit, the 13th day of June, 1941, came the Defendant-Appellee by its attorneys and filed in the Clerk's office of said Court its certain Designation of Additional Portions of Record in words and figures following, to wit: Filed June 13, 1941.

158 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2341) * *

DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED IN RECORD ON APPEAL.

No. Date

1. Dec. 10, 1940. Motion to dismiss, affidavit in support of motion to dismiss, Exhibits A to F, inclusive, attached to the affidavit in support of motion to dismiss.
2. Feb. 6, 1941. Memorandum of reply to
I. Plaintiffs' motion to strike.
II. Counter-affidavit of plaintiffs.
II. Plaintiffs' answer relating to "Res Adjudicata and Release" set forth in defendant's motions.
IV. Memorandum brief in answer to defendant's motions to dismiss and for summary judgment.
and Exhibits G to I, inclusive, attached thereto, filed with the Secretary of Honorable John P. Barnes, Judge of the United States District Court.
3. Feb. 10, 1941. Report of proceedings and opinion of the court on defendant's motion for summary judgment.

Harry I. Allen,
Paul R. Conaghan,
Attorneys for Elgin, Joliet and Eastern Railway Company, Appellee.
208 S. LaSalle Street,
Chicago, Illinois.
Telephone: State 0300.

159 Received a copy of the foregoing designation of additional portions of the record, proceedings and

evidence to be included in record on appeal this 13th day of June, 1941.

John H. Gately,
Attorney for Appellants.

Filed June 20, 1941.

160 And on, to wit, the 20th day of June, 1941, came the Plaintiffs-Appellants by their attorneys and filed in the Clerk's office of said Court their certain Amended Designation of Contents of Record on Appeal in words and figures following, to wit:

161 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2341) * *

AMENDED DESIGNATION OF CONTENTS OF RECORD OF APPEAL.

By leave of Court first had and obtained, Plaintiffs-Appellants herein file this as their amendment to the Designation of Contents of Record on Appeal:

No.	Date.	
16.	June 20, 1941.	Motion to Exclude from the Record.
17.	June 20, 1941.	Order Denying Motion.

John H. Gately,
Maurice J. Walsh,
Attorney for Appellants,
134 S. LaSalle Street, Chicago
Telephone: Franklin 4546.

Received a copy of the foregoing Amended Designation of Contents of Record on Appeal this 20th day of June, A. D. 1941.

Harry I. Allen and
Paul R. Conaghan,
Attorneys for Appellee.

1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable John P. Barnes, District Judge of the United States for the Northern District of Illinois on thirteenth day of November, in the year of our Lord one thousand nine hundred and forty-two, being one of the days of the regular November Term of said Court, begun Monday, the 2nd day of November, and of our Independence the 167th year.

Present:

Honorable John P. Barnes.
William H. McDonnell, U. S. Marshal.
Roy H. Johnson, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois,

Eastern Division.

G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith and M. H. Young,

vs.

Elgin, Joliet and Eastern Railway Company, a corporation.

No. 2341.

Be It Remembered, that the following petition was filed in the above-entitled cause in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 2nd day of November, 1942.

Filed Nov. 2, 1942.

3 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—2341) • •

PETITION.

Now come the plaintiffs herein, G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. J. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith, and M. H. Young, by John H. Gately, their attorney, and respectfully submits to the Court that heretofore on, to-wit, the 10th day of February, A. D. 1942, the United States Circuit Court of Appeals for the Seventh Circuit rendered a decision in the above-entitled cause, wherein the judgment heretofore rendered herein was reversed, and directions issued to proceed in accordance with said opinion, which suggested that certain amendments should be made to the pleadings filed herein.

Your petitioners further respectfully state that a mandate from the United States Circuit Court of Appeals has been duly filed herein.

Your petitioners pray that they may be allowed to amend said Complaint by substituting in lieu of Paragraph 1 thereof, the attached amendment, and in lieu of Paragraph 9 thereof, the attached amendment, which said amendments shall amend all of the pleadings filed herein, and briefs, abstracts, and memoranda filed of record in the United States Circuit Court of Appeals.

4 Petitioners further pray that this Honorable Court will render a decision on the amended Complaint, and that the Motion and Counter-motion and all other pleadings filed subsequent to said original Complaint, may stand as Motions and Counter-motions to the Complaint as amended; that the Court may render its decision thereon, and that an appeal may be granted forthwith on the said Amended Complaint and decision thereunder, and that the Clerk of this Court may be instructed to certify said amendments to the United States Circuit Court of Appeals for the 7th Circuit; that the record heretofore certified may stand with said amendments so added.

And Your Petitioners Will Ever Pray.

G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith, M. H. Young,
By John H. Gately,
By John H. Gately,
134 S. LaSalle Street,
Franklin 4546.

State of Illinois } ss.
County of Cook }

John H. Gately, being first duly sworn, on oath deposes and says that he is the attorney for the plaintiffs-appellants in the above-entitled cause; that he has read the Petition, by him subscribed, knows the contents thereof, and believes the same to be true in substance and in fact.

John H. Gately.

Subscribed and Sworn to before me this 26th day of October, A. D. 1942.

Herman Herson,
Notary Public.

(Seal)

5 Amendments to the Complaint.

Amendment to Paragraph 1:

The plaintiffs herein, G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith, and M. H. Young, are all residents of the State of Indiana, and the defendant herein is a corporation incorporated under the laws of Illinois; and that the matters in controversy exceed, exclusive of interest and costs, the sum of $3,000.00.

Amendment to Paragraph 9:

That by reason of the violation of said agreement as aforesaid by the defendant, the approximate following amounts with interest thereon at five per cent (5%) per annum from the date due until paid, are owed plaintiffs by defendant, as follows:

G. W. Burley	$ 7,000.00
James E. Challender	4,500.00
W. R. Garvey	14,000.00
J. M. Harr	3,500.00
A. T. Hatfield	7,000.00
R. P. Jones	6,974.00
P. F. McNamara	4,800.00
R. L. Miller	7,000.00
B. F. Smith	7,000.00
M. H. Young	3,500.00

6 And afterwards, to wit, on the 13th day of November, A. D. 1942, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge appears the following entry, to wit:

7 IN THE DISTRICT COURT OF THE UNITED STATES. Entered Nov. 13, 1942.
* * (Caption—2341) * *

ORDER.

This cause coming on to be heard upon the Petition of G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith, and M. H. Young, by John H. Gately, their attorney, and it appearing to the Court that a decision was heretofore rendered by the United States Circuit Court of Appeals for the Seventh Circuit, on the 10th day of February, A. D. 1942, remanding the above entitled cause to this Court for the purposes of amendment, and upon Stipulation of the parties that the decision presented this day before the Court was the decision of the United States Circuit Court of Appeals for the Seventh Circuit, and it appearing in said Petition that said plaintiffs desire to amend said Complaint filed herein, by deleting therefrom certain parties who were residents of Illinois, and amending the ad damnum for certain parties plaintiff; that said amendments shall be considered as amendments to all pleadings filed herein, and that the motions and counter-motions filed to the original Complaint filed herein shall stand as motions and counter-motions to the Complaint as amended, and the evidence adduced and the arguments presented to said original Complaint shall stand
8 as evidence and arguments to the Complaint as amended and all motions and counter-motions, and it appearing that plaintiffs and defendant are represented in Court by counsel;

It is Hereby Ordered, Adjudged and Decreed that the amendments set forth in said Petition filed herein be, and the same are hereby allowed to be filed to the original Complaint as amended herein, and are to be considered as amendments to all pleadings in said cause; and

It Is Further Ordered that all motions and counter-motions filed herein to said Complaint may stand as motions and counter-motions to said Complaint as amended; and

It is Further Ordered that the evidence, affidavits and points of law presented with reference to the original Complaint shall stand as the evidence, affidavits and points

of law to the said Complaint as amended and all motions and counter-motions; and

It Is Further Ordered that said cause is now standing at issue upon the Complaint as amended and the motions and counter-motions, with affidavits attached and admissions made by counsel in open Court, and upon the motion of the defendant to dismiss the Complaint; and

The motion of the defendant in the foregoing entitled case for summary judgment for the defendant and against the plaintiffs, pursuant to Rule 56 (c) of the Rules of Civil Procedure, having been presented, and the Court having considered the pleadings, affidavits, exhibits, admissions and briefs filed by counsel for the plaintiffs and the defendant, and having heard the oral argument of counsel for the plaintiffs and the defendant upon the whole case, and having considered said motions to dismiss and for summary judgment for the defendant and being fully advised in the premises:

9 The Court has reconsidered its opinion as expressed in the report of proceedings in this case on the 10th day of February, 1941, and hereby affirms its opinion.

The Court hereby finds that the defendant herein is entitled to a summary judgment as a matter of law.

It Is Hereby Ordered, Adjudged and Decreed that the defendant's motion for summary judgment be, and the same hereby is, granted, that the plaintiffs herein do have and recover nothing by their suit, that the defendant, Elgin, Joliet and Eastern Railway Company, go hence without day, and that the said defendant do have and recover of and from the plaintiffs its costs and charges in this behalf expended and have execution therefor.

Enter:

John P. Barnes,
Judge.

Dated: November 13, 1942.

10 And on, to wit, the 28th day of December, 1942, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Notice of Appeal in words and figures following, to wit:

11 IN THE DISTRICT COURT OF THE UNITED STATES, Filed Dec. 28, 1942.

Northern District of Illinois,

Eastern Division.

G. W. Burley, *et al.*, *Plaintiffs*,
vs.
Elgin, Joliet and Eastern Railway Company, a corporation, *Defendants.*
} Civil Action. No. 2341.

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS UNDER RULE 73(b).

Notice is Hereby Given that plaintiffs, G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith, and M. H. Young, by John H. Gately, their attorney, hereby appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the order entered on the 13th day of November, A. D. 1942, as follows:

It Is Therefore Ordered that the defendant's motion for summary judgment be, and the same is, hereby granted that the plaintiffs herein do have and recover nothing by their suit; that the defendant, Elgin, Joliet and Eastern Railway Company, go hence without day, and that the said defendant do have and recover of and from the plaintiffs its costs and charges in this behalf expended and have execution therefor.

G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith, and M. H. Young,
By John H. Gately,
John H. Gately,
134 S. La Salle Street,
Franklin 4546.

Filed Dec. 28, 1942.

12 And on, to wit, the 28th day of December, 1942, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Notice of Filing of Notice of Appeal in words and figures following, to wit:

13 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2341) * *

NOTICE OF FILING OF NOTICE OF APPEAL.

To: Messrs. Knapp, Allen and Cushing,
Attorneys for Defendant,
208 S. La Salle Street,
Chicago, Illinois.

You Are Hereby Notified that the plaintiffs-appellants have this 28th day of December, A. D. 1942, filed their Notice of Appeal in the above-mentioned cause, a copy of which Notice of Appeal is hereto attached and served upon you.

John H. Gately,
134 S. La Salle Street,
Franklin 4546,
Attorney for Plaintiffs-Appellants.

Received a copy of the above Notice of filing of Notice of Appeal, together with copy of Notice of Appeal therein referred to, this 28th day of December, A. D. 1942.

Paul R. Conaghan.

14 And on, to wit, the 28th day of December, 1942, came the Plaintiffs-Appellants by their attorney and filed in the Clerk's office of said Court their certain Statement of Points in words and figures following, to wit:

15 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Dec. 28, 1942.
• • (Caption—2341) • •

STATEMENT OF POINTS.

Plaintiffs-Appellants herewith present the points upon which they claim the Court erred:

1. In denying the Plaintiffs' Motion to Strike the Defendant's Motion to Dismiss the Complaint, said motion to dismiss containing pleas of res judicata and release.
2. In allowing the motion of the defendant for summary judgment.
3. In entering judgment that the plaintiffs take nothing by their complaint.
4. In denying the Plaintiffs' right to trial by jury of the issues of fact set up in the complaint; and the issues of fact improperly raised by the Defendants in their motion and affidavit, that is the plea of release therein contained.

G. W. Burley, et al.,
By John H. Gately,
John H. Gately,
134 S. La Salle St.,
Franklin 4546.

16 And on, to wit, the 13th day of February, 1943, came the Plaintiffs-Appellants by their attorney and filed in the Clerk's office of said Court their certain Designation of Contents of Record on Appeal in words and figures following, to wit: Feb. 13, 1942. Filed

17 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—2341) • •

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

1). Transcript of proceedings heretofore filed in the United States Circuit Court of Appeals, their case No. 7717.
2). Petition for leave to amend Complaint.
3). Order of Court entered on said Petition.

4). Notice of Appeal to the United States Circuit Court of Appeals.
5). Notice of filing Notice of Appeal.
6). Statement of Points.

John H. Gately,
John H. Gately,
Attorney for Plaintiffs.

Received a copy of the Designation of Contents of Record on Appeal, this 13th day of February, A. D. 1943.

Paul R. Conaghan,
Attorney for Defendant.

Northern District of Illinois, } ss.
Eastern Division, }

I, Roy H. Johnson, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete Amended transcript of the proceedings had of record made in accordance with Designations filed in this Court in the cause entitled G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith and M. H. Young *vs.* Elgin, Joliet & Eastern Railway Company, a corporation, No. 2341, as the same appear from the original records and files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 21st day of April, A. D. 1943.

(Seal)

Roy H. Johnson,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record, printed under my supervision and filed on the twenty-eighth day of May, 1943, in:

Cause No. 8249

G. W. Burley, *et al.*,
Plaintiffs-Appellants,

vs.

Elgin, Joliet and Eastern Railway Company, a Corp.,
Defendant-Appellee,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of April, A. D. 1944.

Kenneth J. Carrick
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the sixth day of October, in the year of our Lord one thousand nine hundred and forty-two, and of our independence, the one hundred and sixty-seventh.

G. W. Burley, *et al.*, *Plaintiffs-Appellants,* *vs.* Elgin, Joliet and Eastern Railway Company, a Corporation, *Defendant-Appellee.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
8249	

And, to-wit: On the twenty-fourth day of February, 1943, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellants, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8249

G. W. Burley, *et al.*,

vs.

Elgin, Joliet and Eastern Railway Company, a Corporation.

The Clerk will enter my appearance as counsel for appellants.

John H. Gately,
134 S. La Salle St.

Endorsed: Filed February 24, 1943. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the seventeenth day of April, 1943, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8249

G. W. Burley, *et al.*,
Plaintiffs-Appellants,

vs.

Elgin, Joliet and Eastern Railway Company, a corporation,
Defendant-Appellee.

The Clerk will enter my appearance as counsel for defendant-appellee.

Paul R. Conaghan,
208 South La Salle Street,
Chicago, Ill.

Endorsed: Filed April 17, 1943. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the fifteenth day of October, 1943, the following further proceedings were had and entered of record, tc-wit:

Friday, October 15, 1943.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.

G. W. Burley, *et al.*, *Plaintiffs-Appellants*, *vs.* Elgin, Joliet and Eastern Railway Company, a Corporation, *Defendant-Appellee.* 8249	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. John H. Gately, counsel for appellant, and by Mr. Paul R. Conaghan, counsel for appellee, and the Court takes this matter under advisement.

And afterwards, to-wit: On the tenth day of November, 1943, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 8249. October Term and Session, 1943.

G. W. BURLEY, Et Al., *Plaintiffs-Appellants,*
vs.
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A Corporation, *Defendant-Appellee.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

November 10, 1943.

Before MAJOR, KERNER, and MINTON, *Circuit Judges.*

MINTON, *Circuit Judge.* Prior to July 24, 1934, the plaintiffs-appellants were employed as switching crews in the yards of the Standard Oil Company at Whiting, Indiana. The defendant-appellee took over the operations in the yards, and employed the plaintiffs as switching crews.

The complaint alleges that the plaintiffs were members of the Brotherhood of Railroad Trainmen, and that the defendant and the plaintiffs agreed that as to rates of pay, hours, and working conditions, the parties should be governed by a schedule or agreement then in force between the defendant and its employees, which had been negotiated by the Brotherhood of Railroad Trainmen as a representative of the switching crews of the defendant. It was alleged that Article 6 of the schedule or agreement provided that the switch engines should start from a certain place at a certain time; that this Article 6 was by agreement of the plaintiffs and the defendant suspended for the first thirty days of the employment of the plaintiffs

by the defendant, and that after the expiration of the said thirty-day period and until November 14, 1938, the defendant violated said Article 6; that for the defendant's failure to observe Article 6, it became liable, under the terms of the agreement and in accordance with the established practice among railroads, to pay the plaintiffs as damages for each day's violation an additional day's pay at time and one-half. The sufficiency of this complaint was raised by a motion to dismiss.

We think the complaint states prima facie a cause of action. It is alleged that it is the duty of the defendant to observe Article 6 of the employment schedule or agreement, and that the defendant has violated Article 6, and by reason of such violation, the plaintiffs are entitled to damages; and that the amount of the damages is fixed "in accordance with the established practice among railroads and employees thereof, and as provided in said Article 6 of said agreement as aforesaid." Article 6 is set forth in the complaint and contains no provision for damages in the event of its violation, or the measure thereof. It was contended by the defendant that the custom and usage relied upon to measure the damages was not sufficiently alleged. We think that the allegation of the custom and usage was sufficient to withstand a motion to dismiss. *Lemos* v. *Madden*, 28 Wyo. 1, 200 Pacific 791. Certainly, under the liberal practice of pleading permitted under the Federal Rules of Civil Procedure, this allegation is sufficient.

It was also contended by the defendant that there was no allegation that the defendant knew of this custom and usage. It has been held by us that parties to a contract engaged in the same trade will be presumed to have contracted with reference to, and to have knowledge of, all lawful usages of that trade. *Western Petroleum Co.* v. *Tidal Gasoline Co.*, 284 Fed. 82, 84. The allegation of knowledge on the part of the defendant was not necessary, as the plaintiffs and the defendant were engaged in the same industry, and an allegation showing the fact of such relationship is sufficient.

At the time the defendant filed the motion to dismiss, it set forth in a pleading accompanying the motion the defense that any claims the plaintiffs might have had were compromised and settled by the plaintiffs' agents,

who were the Chairman and the Secretary of the Grievance Committee of the Brotherhood of Railroad Trainmen, the bargaining agents for the plaintiffs. Affidavits and certain documents were attached to this hybrid pleading, and a motion to strike it was filed by the plaintiffs.

Thereafter, the defendant filed a motion for summary judgment. The plaintiffs then filed a reply to this motion, in which it was alleged the said bargaining agents were not authorized to negotiate, compromise, and settle any claims the plaintiffs might have for damages for violation of Article 6, and that their authority was limited "to prosecuting a complaint before the Board to compel the defendant to comply with Article 6." Affidavits, bylaws, and the constitution of the labor organization were exhibited. The defendant filed its reply to the plaintiffs' motion to strike and to the counter-affidavits of the plaintiffs. The District Court granted the defendant's motion for summary judgment.

Was the defendant entitled to summary judgment? We think the motion should not have been granted, because it seems clear to us that this record presents a question of fact as to whether a compromise of the claims relied upon in the plaintiffs' complaint had been compromised by the plaintiffs' agents. This depends upon the authority of the so-called agents of the plaintiffs to negotiate, compromise, and settle plaintiffs' claims for damages for the violation of Article 6. The plaintiffs admit they authorized the bargaining agents to negotiate, which carried with it the right to compromise and settle, the question of what the defendant was going to do about the observance of Article 6. But the plaintiffs deny that they ever gave authority to the bargaining agents to negotiate, compromise, and settle their claim for damages for past violations of Article 6.

The procedure for summary judgment was intended to expedite the settlement of litigation where it affirmatively appears upon the record that in the last analysis there is only a question of law as to whether the party should have judgment in accordance with the motion for summary judgment. If there was any question of fact presented on the record in the proceedings for summary judgment, the motion could not be sustained. *Campana Corporation* v. *Harrison*, 135 F. 2d 334, 336. Because we think this

record affirmatively shows there was an issue of fact, the motion for summary judgment should not have been granted.

The judgment is reversed, and the cause remanded, with instructions to proceed in accordance with this opinion.

Endorsed: Filed November 10, 1943. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the tenth day of November, 1943, the following further proceedings were had and entered of record, to-wit:

Wednesday, November 10, 1943.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.

8249	G. W. Burley, *et al.*, *Plaintiffs-Appellants*, *vs.* Elgin, Joliet and Eastern Railway Company, a Corporation, *Defendant-Appellee.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said District Court with instruction to proceed in accordance with the opinion of this Court filed this day.

And afterwards, to-wit: On the twenty-sixth day of November, 1943, there was filed in the office of the Clerk of this Court, a Petition for Rehearing, which said Petition is in the words and figures following, to-wit:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 8249

G. W. BURLEY, ET AL.,
Plaintiffs-Appellants,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,
HONORABLE JOHN P. BARNES, TRIAL JUDGE.

Petition for Rehearing.

PAUL R. CONAGHAN,
208 S. LaSalle St.,
Chicago, Illinois,
Counsel for Defendant-Appellee.

C. C. A. - 7
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CLERK

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 8249

G. W. BURLEY, ET AL.,
Plaintiffs-Appellants,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, HONORABLE JOHN P. BARNES, TRIAL JUDGE.

Petition for Rehearing.

Elgin, Joliet and Eastern Railway Company petitions this Court for a rehearing. Your petitioner requests also that oral argument be granted before the matters set forth in this petition shall be determined.

Your petitioner respectfully represents that certain points and authorities set forth in its brief filed herein have been overlooked or misapprehended.

The question of agency in this case was considered
the Court as a question arising at common law. This w
an error. The agency question cannot be considered apa
from the provisions of the Railway Labor Act. This A
was not considered by the Court in the decision hand
down on November 10, 1943. The issues before this Cou
necessarily involve a construction of that Act and t
effect of the award for the defendant made by the admini
trative Board created by that Act.

Whether the District Court correctly entered summa
judgment for the defendant depends upon whether t
award of the Adjustment Board is final and binding. T
District Court found that the award for the defenda
was final and binding *as a matter of law.* That findi
was the *ratio decidendi* of its opinion. This Court d
not pass upon the issue. If the award of the Adjustme
Board is final and binding, the District Court correct
entered summary judgment for the defendant and th
judgment should have been affirmed by this Court.

I.

The Award of the Adjustment Board Is Final and Bindi

On pages 16 and 45 of your petitioner's brief and arg
ment, there is set forth the point that the award render
by the Adjustment Board on September 6, 1940 in fav
of the defendant is final and binding upon the plainti
in the case at bar. This award (Supp. Tr., 26-39),
Docket 7324, in part found (Supp. Tr., 39) that

> "The evidence shows that the parties to the agr
> ment disposed of the claim here made by the lett
> of the carrier, dated October 28, 1938, accepted
> the employees October 31, 1938.
>
> Award.
>
> Claim denied per Findings."

Section 153 (m) of the Railway Labor Act (45 USCA) provides that

> "the award shall be final and binding upon both parties to the dispute."

As stated on page 48 of your petitioner's brief, authority of the General Chairman of the Grievance Committee to file a complaint before the Adjustment Board in the name of "Brotherhood of Railroad Trainmen" alleging that the defendant violated Article 6 of its labor agreement and claiming for the plaintiffs (among others)

> "one day's pay at time and one-half for . . . each day they were required to work in yard service in the Whiting (Standard Oil Company) yard . . . from the dates of August 27, 1934 until November 14, 1938, inclusive." (Supp. Tr. 26)

is implied because of the very nature of his office and functions in the Brotherhood. All plaintiffs in the case at bar were members of the Brotherhood. (Brief p. 3, Supp. Tr. p. 4.)

The General Chairman of the Grievance Committee of the Brotherhood of Railroad Trainmen, as pointed out on page 48 of your petitioner's brief, had been designated by the plaintiffs as their "representative" to act for them in the presentation of their claim before the defendant and later before the Adjustment Board relating to the alleged violation of Article 6 of the labor agreement. These facts are not denied by plaintiffs. The fact that the second claim filed before the Adjustment Board sought to obtain additional pay at time and one-half for each day worked between August 27, 1934 and November 14, 1938, and that the first claim filed before the Adjustment Board sought only to compel the defendant to comply with the provisions of Article 6 of the labor agreement is immaterial so far as this Court is concerned. This Court is bound by the adjudication of the Adjustment Board deny-

ing the second claim. *Washington Terminal Co.* v. *Boswell,* 124 F. 2d 235; brief p. 51.

Congress has provided specifically for *limited* court review in certain types of disputes arising out of agreements between railroads and labor organizations. *Washington Terminal Co.* v. *Boswell,* 124 F. 2d 235, affirmed, 63 S. Ct. 1430; brief, pp. 16, 17, 18, 51, 57. Congress has not given to courts power to decide jurisdictional controversies between unions and a railroad. *Switchmans Union of North America* v. *National Mediation Board, et al; General Committee of Brotherhood of Locomotive Engineers* v. *M. K. T. R.R. Co.; General Committee of Brotherhood of Locomotive Engineers* v. *Southern Pacific Co., et al,* all decided by the Supreme Court of the United States, November 22, 1943. (See also brief, Point IV B, p. 53.)

In the latter case, the Court stated:

> "It seems to us plain that when Congress came to the question of these jurisdictional disputes it chose not to leave their solutions to the courts.
>
> "To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board . . . The conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability . . . Courts should not rush in where Congress has not chosen to tread."

In the three opinions handed down November 22, 1943, the Supreme Court decided that in the absence of specific provisions for judicial review, jurisdictional disputes between labor unions and a railroad should be decided by

ne Mediation Board established by the Railway Labor ct and that courts have no power to decide such contro- ersies. The same reasoning applies to awards of the djustment Board created by the same Act.

There is no provision in the Railway Labor Act by which he award of the Board denying the claim of the plaintiffs n the case at bar might be reviewed by this Court. In he absence of such a provision, this Court has no power o review the award. The plaintiffs in the case at bar re seeking Court review of their claims, a right denied hem by the Railway Labor Act. The award of the Board hould be given the legal effect directed by Congress—that s, the award "shall be final and binding upon both par- ies to the dispute" and *upon this Court.*

The award also contains findings of fact (Supp. Tr., 39) as follows:

> "The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.
>
> "This Division of the Adjustment Board has jurisdiction over the dispute involved herein.
>
> "The parties to said dispute were given due notice of hearing thereon."

These findings of fact by the administrative agency satisfied the District Court and should satisfy this Court that the elementary requiremnets of due process, jurisdiction of the dispute and notice to the parties and an opportunity to be heard, so far as the plaintiffs in the case at bar are concerned, were complied with by the administrative agency. This Court is bound by such findings of fact.

When the Adjustment Board handed down its award in the second complaint filed by the Brotherhood in this case denying the claim in accordance with the findings

of fact, this Court was ousted of its jurisdiction because the award of the Board was final and binding. The Chairman of the Grievance Committee of the Brotherhood originally could have filed suit for alleged back wages due in accordance with the alleged custom either in a court of law or before the Adjustment Board. (*Moore* v. *Illinois Central*, 312 U.S. 630, brief, pages 36, 50.) When the privilege was exercised by the "designated representative" of the plaintiffs and a claim was filed before the Adjustment Board and the Adjustment Board denied the claim in accordance with the finding of facts, that award of the Adjustment Board has a legal effect binding upon this Court. (*Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235, 244; brief page 52.) In other words, the award of the Adjustment Board is final and binding and this Court cannot ignore the legal consequences of the award by considering this case as one arising as at common law. The question of common law agency is not a justiciable controversy in this case.

II.

The Opinion of This Court Conflicts with Other Federal Court Decisions.

The decision of this Court conflicts with the opinion in the case of *Division 525, Order of Railway Conductors of America* v. *Gorman, et al*, 133 F. 2d 273, CCA 8, 1943; brief, p. 49. This case held that the defendant cannot be required to examine into the specific authority granted the "designated representative" of the Order when entering into a collective bargaining agreement.

The same reasoning applies when the "designated representative" of the Brotherhood and of the plaintiffs in the case at bar made the compromise agreement and presented the claim before the Adjustment Board. The

defendant cannot be required to determine, as the opinion of this Court directs, whether the claim filed in the name of the Brotherhood of Railroad Trainmen by the Chairman of the General Grievance Committee of the Brotherhood was specifically authorized by the plaintiffs. This requirement, as the defendant points out on page 48 of its brief, would destroy collective bargaining made mandatory by the Railway Labor Act. If the Chairman of the Grievance Committee was the "designated representative" of the Brotherhood of Railroad Trainmen and authorized to confer with the defendant, then the defendant is *compelled* (45 USCA sec. 152, second) to "consider" and, if possible, "decide" all disputes. Vagaries of the rules of common law agency need not be considered by the defendant.

If the petition for rehearing in this case is not granted and if your petitioner is required in every case of collective bargaining to determine whether the Chairman of the Grievance Committee of the Brotherhood of Railroad Trainmen has been actually authorized to make the particular agreement concluded, the defendant will be required to obtain specific authority from its thousands of employees in Indiana and in Illinois before it can begin negotiations with the "designated representative." The problem would be even more complex for transcontinental railroads having employees in many states.

If the authority of the "designated representatives" of the employees "to negotiate, compromise and settle plaintiff's claim for damages for the violation of Article 6" is considered as a matter of agency at common law, requiring the defendant to demand strict proof of the agency from all of the employees involved, in this case from all of the plaintiffs and others, collective bargaining will break down. (Brief, pages 32, 33.) Such proof necessarily would be of a nature to satisfy a jury by a preponderance of the evidence or a court as a matter of law that the

"designated representative" was authorized to perform every particular act and enter into every particular agreement consummated. Such requirement, as a practical measure, would result in industrial strife, "interruption to commerce or to the operation" of railroads and bring about the very conditions which the Railway Labor Act sought to prevent.

Nevertheless, such must be the policy of this defendant if this petition for rehearing is not granted. No other course of safe procedure is permitted by the decision handed down by this Court on November 10, 1943. Such detailed requirements would destroy the provisions of the Railway Labor Act and thus nullify the expressed compulsion of Congress that railroads settle disputes with "designated representatives" of labor organizations, either by compromise agreement or by disposition of the Adjustment Board. (Brief, page 32.)

Greater confusion would result with reference to claims filed before the Adjustment Board. This defendant and all railroads, if this petition for rehearing is not granted, will be required to examine into the specific authority of the "designated representative" or proceed at their peril. Frequently claims involve many employees, as in the case at bar. The opinion of this Court requires that the specific authority of the "designated representative" to file a claim before the Adjustment Board for each employee he claims to represent must be shown in a manner to satisfy the common-law rules of agency. Neither the defendant nor any other railroad can follow the decision of this Court and the requirement of the Railway Labor Act to "settle all disputes," if possible, *promptly* with the "designated representative" of the employees, if the opinion of this Court is not reconsidered on rehearing.

The Railway Labor Act merely requires that "failing to reach an adjustment", "the disputes may be referred . . . by either party" to the Adjustment Board, whose

"awards shall be final and binding upon both parties to the dispute." 45 USCA, sec. 153 (i), (m). The opinion of this Court renders these provisionss of the statute nugatory.

This Court overlooked also the case of *Smith et al* v. *Texas & N. O. R. Co.* (32 F. Supp. 1013, 118 F. 2d 75, CCA 5; brief pages 13, 14, 15, 17, 33, 37) and the case of *System Federation* v. *Louisiana Ry. Co.* (30 F. Supp. 909, 119 F. 2d 509, CCA 5; brief pages 50, 51). In the *Smith* case the employee died six months *before* the execution of the compromise agreement allowing "back wages." If rules of common law agency were applicable, the death of the employee revoked the agency and his children would not have been bound by the provisions of the compromise agreement made by the "designated representatives" during collective bargaining negotiations. The Circuit Court of Appeals, however, held that his children were bound by the agreement. In the *System Federation* case the Circuit Court of Appeals held that "any and all claims for damages" were cancelled by the collective bargaining agreement. Common-law agency rules were not applicable. The same reasoning was applied with approval of the Supreme Court of the U. S. in the case of *Evans et al* v. *Johnson et al* (300 Ill. App. 78, 20 N. E. 2d 841, cert. denied 309 U. S. 662; brief, page 39), overlooked also by the Court in its opinion of November 10, 1943.

III.

Rules and By-Laws of the Brotherhood Authorized the Compromise Settlement and the Filing of the Claim Before The Adjustment Board.

The Court in its opinion overlooked the rules and by-laws of the Brotherhood, part of the record before the Court. Rule No. 10 in part provides (brief, page 41) "whatever action may be taken by the General Grievance Committee

• • • shall be law to the Lodges • • • and if any member refuses to • • • abide by the action of such General Grievance Committee • • • he shall be expelled from the Brotherhood for violation of obligation."

This rule alone gave the General Chairman and Secretary of the General Grievance Committee of the Brotherhood power to make the compromise agreement of October 31, 1938, and to file the claim before the Adjustment Board.

CONCLUSION.

The plain direction of Congress that the award of the Adjustment Board denying the claim of the Brotherhood for damages for past violations of Article 6 should be "final and binding" upon the plaintiffs in the case at bar was overlooked by the Court in handing down its opinion of November 10, 1943. Admitting that the complaint states a cause of action at common law, the question of the effect of the award upon the rights of the plaintiffs to recover remains unanswered by this Court. Reference to the authority of the agent to bind the plaintiffs not only begs the question but also violates the policy which Congress in the Railway Labor Act provided as paramount.

Whether the award of the Adjustment Board is "final and binding" does not depend upon the niceties of the law of agency. The only question presented to this Court for adjudication, as far as the finality of the award is concerned, is whether the dispute was "referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts" as required by Section 3(i) of the Railway Labor Act, whether the "parties" were heard by their "representatives" and given "due notice" as required by the following paragraph (j), whether "findings" were made in the "final award" as provided in paragraph (k), whether a referee

was chosen as provided in paragraph (l) and whether a "copy of the award" was "furnished to the respective parties to the controversy" as provided in paragraph (m). If these requirements have been met—and plaintiffs admit that they have—then the "award" of the Board "shall be final and binding upon both parties to the dispute" as provided in paragraph (m).

This presents no jury question. Thus, the summary judgment entered by the District Court was correct. It should be affirmed by this Court upon rehearing.

The plaintiffs have had their day. This Court should not give them another. To do so violates the Railway Labor Act and ignores the mandate of Congress. The plaintiffs are prohibited from doing by indirection what the Railway Labor Act denies them to do directly—that is, have a court adjudication after the Adjustment Board has denied their claim. (*Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235; affirmed, 63 S. Ct. 1430; brief, pages 16, 17, 18, 51, 57.)

Furthermore, the decision of this Court conflicts with other Federal decisions and ignores the rules of the Brotherhood granting power to the General Grievance Committee to make a compromise agreement and to file a claim before the Board for "adjustment," as pointed out in this petition.

Rehearing and oral argument should be granted to decide the issues which this Court has overlooked or misapprehended.

Respectfully submitted,

ELGIN JOLIET AND EASTERN RAILWAY COMPANY,
Defendant-Appellee.

PAUL R. CONAGHAN,
Counsel for Defendant-Appellee.
208 S. La Salle St.,
Chicago, Illinois.

Endorsed: Filed November 26, 1943. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the fourteenth day of March, 1944, the following further proceedings were had and entered of record, to-wit:

Tuesday, March 14, 1944.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.

8249	G. W. Burley, *et al.*, *Plaintiffs-Appellants*, *vs.* Elgin, Joliet and Eastern Railway Company, a Corporation, *Defendant-Appellee.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and it is hereby, denied. Judge Kerner does not concur.

And afterwards, to-wit: On the twenty-second day of March, 1944, the Mandate of this Court issued to the District Court of the United States for the Northern District of Illinois, Eastern Division.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the proceedings had and papers filed, excepting briefs of counsel and motions and orders extending time for filing printed record and briefs, in:

Cause No. 8249

G. W. Burley, *et al.*,
Plaintiffs-Appellants,

vs.

Elgin, Joliet and Eastern Railway Company, a Corp.,
Defendant-Appellee,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of April, A. D. 1944.

Kenneth J. Carrick
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
JUN 14 19
CHARLES ELMORE CR
CL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
a Corporation,
Petitioner,

vs.

G. W. BURLEY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND SUPPORTING BRIEF.

PAUL R. CONAGHAN,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

No. .....

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, a Corporation,

Petitioner,

vs.

G. W. BURLEY, *et al.,*

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Your petitioner, Elgin, Joliet and Eastern Railway Company, respectfully represents that it is aggrieved by the final judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered November 10, 1943 (R. 110), reversing the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, and remanding the case with instructions to vacate the summary judgment entered by the District Court in favor of your petitioner (R. 113). Your

petitioner is further aggrieved by the order of the said United States Circuit Court of Appeals entered on March 14, 1944 (Mr. Justice Kerner dissenting), denying the petition for rehearing in this case (R. 129).

A.

Summary and Short Statement of the Matter Involved.

In an amended complaint filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, on the 2nd day of November, 1942 (R. 96), the respondents alleged diversity of citizenship and sought to recover from your petitioner damages for violation of a labor agreement between your petitioner and the Brotherhood of Railroad Trainmen. All respondents were members of the Brotherhood (R. 4). The respondents claim violation of the labor agreement with reference to the starting time of certain crews in the Whiting (Indiana) switch yard of your petitioner and that as a result of such alleged violation, each respondent (R. 5) is "entitled to pay for an additional day, at time and one-half, at the regular daily rate from August 26, 1934, to and including November 14, 1938, for each foreman and each helper, for each day they were required to work in yard service in the 'Whiting Yard' of the defendant, in accordance with the established practice among railroads and employees thereof and as provided in Article 6 of said agreement as aforesaid."

Your petitioner filed a motion to dismiss the original complaint (R. 9-39 inclusive) and also a motion for summary judgment (R. 42). The District Court rendered summary judgment for your petitioner (R. 84), from which an appeal was taken to the Circuit Court of Appeals (R. 85-86).

The Circuit Court of Appeals reversed the judgment of the District Court because of jurisdictional defects relating to diversity of citizenship (*Alderman* v. *Elgin, Joliet and Eastern Railway Company*, 125 F. 2d 971). In its directions, however, the Circuit Court of Appeals permitted the District Court to allow amendments to cure the jurisdictional defects. The amended complaint curing the jurisdictional defects thereafter was filed by the respondents in the District Court (R. 96-98). The District Court again entered summary judgment for your petitioner (R. 99-100). The respondents again appealed to the Circuit Court of Appeals. That Court in its opinion (R. 113) found that the "record affirmatively shows there was an issue of fact" which should have been submitted to the jury and that "the motion for summary judgment should not have been granted" by the District Court. The judgment of the District Court again was reversed and the cause remanded with instructions.

Your petitioner moved to dismiss (R. 9, 99) and for summary judgment (R. 42, 100) for the reasons that (1) the Brotherhood of Railroad Trainmen, the exclusive bargaining representative for the respondents, and of which all of the respondents were members, settled the matter in dispute by written agreement on October 31, 1938 (R. 16-23), (2) the said written agreement released all claims of the respondents against your petitioner arising out of the alleged violation of Article 6 of the labor agreement between the Brotherhood and your petitioner and (3) the decision of the National Railroad Adjustment Board, First Division, on September 6, 1940 (R. 26-39) denying the claim of the Brotherhood for the alleged violation of Article 6 of the labor agreement is "final and binding" upon the respondents.

B.

Statement of the Basis upon Which It Is Contended That This Court Has Jurisdiction to Reverse the Judgment of the United States Circuit Court of Appeals for the Seventh Circuit.

The jurisdiction of this Court to grant this petition for a writ of certiorari is invoked by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 USCA 347).

The petition for rehearing was denied by the Circuit Court of Appeals (Mr. Justice Kerner dissenting) on March 14, 1944 (R. 129). The time for filing this petition for a writ of certiorari begins from the date the petition for rehearing was denied (28 USCA 350). *Aspen Mining and Smelting Co.* v. *Billings,* 150 U. S. 31; *Gypsy Oil Co.* v. *Escoe,* 275 U. S. 498; *Department of Banking* v. *Pink,* 317 U. S. 264.

The decision of the Circuit Court of Appeals in this case considers only the question of agency existing between the respondents and the representatives of the Brotherhood of Railroad Trainmen as a question arising at common law. This is reversible error. The claims of the respondents against your petitioner cannot rightfully be considered apart from the mandatory provisions of the Railway Labor Act. The opinion of the Circuit Court of Appeals ignored the provisions of that Act. The issues in this case necessarily involve a construction of the Railway Labor Act and the effect of the award for your petitioner made by the Adjustment Board created by that Act.

Whether the District Court correctly entered summary judgment for your petitioner depends upon whether the award of the Adjustment Board is "final and binding."

The District Court found that the award of the Adjustment Board for your petitioner was final and binding *as a matter of law.* That finding was the *ratio decidendi* of its opinion (R. 83). Therefore, in the opinion of the District Court there was no disputable question of fact rightly presented for jury determination. The Circuit Court of Appeals did not even pass upon the issue. If the award of the Adjustment Board is "final and binding" *as a matter of law,* as is expressly provided by the Railway Labor Act (Sec. 153(m) 45USCA), the District Court correctly rendered summary judgment for your petitioner and that judgment should have been affirmed by the Circuit Court of Appeals.

The question whether awards of the Adjustment Board are "final and binding" has not been, but should be, passed upon by this Court. This question is a federal question of substance and of such importance to all of the railroads in the United States and to the proper exercise of jurisdiction by District Courts that this Court should grant this petition for a writ of certiorari.

If the decision of the Circuit Court of Appeals in this case is not reversed, collective bargaining will be destroyed. Railroads will find it impossible to conduct their operations unless they treat directly with their employees regarding matters of grievance, in order to be assured that settlements with the duly authorized representatives of the employees will not be upset by the niceties of the law of agency. Such direct bargaining is demanded by the decision of the Circuit Court of Appeals in this case. The result will be destruction of the policy created by the Railway Labor Act and conflict with the decisions of this Court prohibiting individual dealing with employees as announced in the cases of *The Order of Railroad Telegraphers* v. *Railway Express Agency,* 64 S. Ct. 582 and *J. I. Case Co.* v. *National Labor Relations Board,* 64 S. Ct. 576.

The decision of the Circuit Court of Appeals in this case is not only a decision of a federal question in conflict with the decisions of this Court but also a decision in conflict with decisions of other circuit courts of appeal. (*Washington Terminal Co.* v. *Boswell,* 124 F. 2d 235, CCA-D.C., 63 S. Ct. 1430; *Division 525, Order of Railway Conductors of America* v. *Gorman, et al.,* 133 F. 2d 273, CCA 8, 1943; *Virginian Railway Co.* v. *System Federation No. 40,* 131 F. 2d 840, 844, 300 U. S. 515, 548; *Smith et al.* v. *Texas & N. O. R. Co.,* 32 F. Supp. 1013, 118 F. 2d 75; *System Federation* v. *Louisiana Ry. Co.,* 30 F. Supp. 909, 32 F. Supp. 89, 119 F. 2d 509). The decision sought to be reviewed so far departs from the accepted and usual course of judicial proceedings and thereby so far sanctions such departure by district courts as to demand the exercise of the power of supervision by this Court in granting this petition for a writ of certiorari.

The dispute in this case between the respondents, the Brotherhood of Railroad Trainmen and your petitioner is not unlike a jurisdictional controversy between unions which this Court in *Switchman's Union of North America* v. *National Mediation Board,* 64 S. Ct. 95, *General Committee* v. *Southern Pacific R. R. Co.,* 64 S. Ct. 142, and *General Committee* v. *M. K. & T. R. R. Co.,* 64 S. Ct. 146, held not to be a justiciable controversy within the meaning of the Railroad Labor Act. If courts are without power to declare a union agreement void because the labor union which negotiated it was claimed by the plaintiffs not to be authorized to represent the employees, as in the case of *General Committee* v. *M. K. & T. R. R. Co.,* 64 S. Ct. 146, then courts are without power to adjudicate where, as in this case, a group of employees claim that representatives of the union have exceeded their authority in executing a compromise agreement relating to grievances of the particular group and the Adjustment Board, following

the expressed provisions of the Railway Labor Act, has decided that the compromise agreement made by representatives of the union was a bar to the claims of the particular employees. If the Railway Labor Act prohibits courts from declaring where the jurisdiction of one craft ends and the authority of another begins with respect to the rights of collective bargaining, *a fortiori*, courts have no power to pass upon the question of the limitations, if any, upon the acts of collective bargaining representatives within the unquestioned limitations of the jurisdiction of such representatives after the Railroad Adjustment Board has passed upon the exercise of such jurisdiction, as in this case, and has found that the settlement made by such representatives is conclusive. If courts are without power to adjudicate where the representatives are not authorized by the Mediation Board to represent at all, then courts have no power to declare a settlement agreement void because the representatives have improperly represented a particular group of employees, especially after the Adjustment Board has declared otherwise. If courts may not make a determination between the conflicting claims of labor unions for representation, then the provisions of the Railway Labor Act prohibit the power of courts to be exercised with reference to a particular group of employees within a labor organization, after the Adjustment Board has made its award, except as defined by the procedural sections of the Railway Labor Act.

The question whether authorized representatives of the Brotherhood of Railroad Trainmen or any other labor organization have the power to settle grievances by a written compromise agreement and the power of the Adjustment Board to deny relief, because of such compromise agreement, so that the legal effects of such a settlement and award of the Adjustment Board will be "final and binding" upon the employees and the company, re-

mains unsettled by the decision of the Circuit Court of Appeals in the case at bar. If employees affected by the compromise agreement and award may repudiate such agreement and award and bring suit in their own name against the railroad, the bargaining relating to grievances of necessity will cease to be collective and will be forced to be individual. This will break down the expressed purpose for which Congress passed the Railway Labor Act. (*Virginian Railway Co.* v. *Federation*, 300 U. S. 515, 548.) As a matter of self-protection, railroads will be forced to deal individually with employees regarding matters relating to rules, rates of pay and working conditions, thus violating the policy declared by the Railway Labor Act which imposes "the affirmative duty to treat only with the true representative and, hence, the negative duty to treat with no other" (*Virginian Railway Co.* v. *Federation*, 300 U. S. 515-548).

If your petitioner and other railroads may not treat with authorized representatives of the Brotherhood of Railroad Trainmen or of other unions *unless and until* "the authority of the so-called agents of the plaintiffs to negotiate, compromise, and settle plaintiffs' claims . . ." (opinion of Circuit Court of Appeals, R. 112) has been clearly established with respect to each particular employee affected, the stopping of each collective bargaining conference for the purpose of establishing agency between collective bargaining representatives and each particular employee will render collective bargaining illusory.

If courts by circuitous reasoning may ignore the expressed findings of the Adjustment Board, as did the Circuit Court of Appeals in the case at bar, the policy of Congress "to settle disputes" promptly and to obtain decisions from the Adjustment Board which are "final and binding", as expressed in the Railway Labor Act, is rendered completely ineffective.

This Court should exercise its jurisdiction by granting this petition for a writ of certiorari not merely to determine whether the Circuit Court of Appeals improperly applied principles of common law agency when it should have applied the clear and mandatory provisions of the Railway Labor Act but also for the purpose of pronouncing legal principles that should be applied by all courts when the Adjustment Board has made its award denying a claim presented by the Brotherhood of Railroad Trainmen or any other labor organization, and the railroad contends that the award is "final and binding" in accordance with the provisions of Sec. 153(m) of the Railway Labor Act.

The question presented by this petition is not one of mere applicability of well settled rules of law. The question relates to what basic principles should be applied by courts generally when representatives of a railroad have conferred with representatives of the Brotherhood of Railroad Trainmen or of any other union to settle matters of grievance and settle them by a written agreement, (as found by the award of the Adjustment Board, in accordance with the procedure and provisions of the Railway Labor Act), and, notwithstanding the award of the Adjustment Board, a particular group of employees seek to impose liability upon the railroad by a suit at law, contrary to the provisions of the compromise agreement and the award of the Adjustment Board. This question is substantial and important. It should be finally determined by this Court by granting this petition for a writ of certiorari.

C.

The Questions Presented.

1. Whether Sec. 153 (m) of the Railway Labor Act (45 USCA), which refers to awards of the Adjustment Board, an administrative tribunal created by that Act,

and which in part provides that "the awards shall be final and binding upon both parties to the dispute . . ." apply (to the facts in this case) when representatives of the carrier and the representatives of the Brotherhood have settled a particular dispute by a written compromise agreement (as found by the Adjustment Board), or whether some employees, regardless of such award of the Adjustment Board, have the right to bring suit at law against the carrier because of the same grievance with reference to which the Adjustment Board denied relief.

2. Whether carriers, notwithstanding the provision of the Railway Labor Act imposing the duties upon representatives of the carrier and of the Brotherhood "to settle all disputes" and, as regards the carriers, "to treat" with the designated representatives of the employees, are required at their peril to ascertain that the designated representatives of the employees have been in fact appointed as agents of each particular employee involved in the settlement to make the particular settlement in question.

3. Whether employees of a carrier, nowithstanding the *limited* provisions for court review in the Railway Labor Act and a decision of the Adjustment Board in favor of the carrier, may, nevertheless, obtain *unlimited* court review of the same subject matter of the dispute passed upon by the Adjustment Board by filing in court a separate suit in their own names.

4. Whether designated representatives of employees empowered to act in the presentation of a claim before the Adjustment Board have, by the very nature of their office, implied authority to compromise the claim in such a manner as to bind each and every employee affected by the compromise.

5. Whether courts have power to decide controversies between employees and a railroad (in an independent

action at law for damages arising from alleged violation of the provisions of a labor agreement) when the Adjustment Board, created by the Railway Labor Act, has already passed upon the merits of the dispute and has rendered an award in favor of the railroad.

6. Whether courts are outsted of power to exercise their jurisdiction in a suit filed by employees against a railroad when the Adjustment Board has passed upon the same subject matter of the suit and has rendered an award in favor of the railroad.

7. Whether respondents, who have received an adverse decision by the Adjustment Board and, consequently, are prevented from appealing to the courts from such an adverse award because of the lack of such remedy in the provisions of the Railway Labor Act, and, notwithstanding the provisions of that Act for *limited* court review, my obtain indirectly *unlimited* court review by filing a new suit at law for damages alleging the same facts as submitted to the Adjustment Board for adjudication.

8. Whether awards of the Adjustment Board, not involving money awards, are "final and binding."

9. Whether a jury question is presented when a railroad relies upon an award of the Adjustment Board in its favor and contends that such award is "final and binding" upon the parties and subject matter of the controversy.

10. Whether the rule of the Circuit Court of Appeals in this case that the power of designated representatives to bind employees "depends upon the authority of the so-called agents of the plaintiffs to negotiate, compromise and settle plaintiffs' claims" shall prevail as distinguished from the universal practice of implied authority in matters pertaining to collective bargaining in a case wherein

"the plaintiffs admit they authorized the bargaining agents to negotiate and settle the question of what the defendant was going to do about the observance of Article 6" of the labor agreement (Opinion of Circuit Court of Appeals, R. 112).

11. Whether a railroad which for many years has made many collective bargaining compromise settlements with representatives of the Brotherhood of Railroad Trainmen, may be ordered by a court to set aside a particular compromise agreement, especially after the Adjustment Board has denied the same claim.

12. Whether courts may ignore the "final and binding" consequences of the award of the Adjustment Board relating to the facts and circumstances in this case.

13. Whether there exists jurisdiction by courts to entertain suits filed by employees against a railroad for damages relating to rates of pay and alleged violation of labor agreements, when the Adjustment Board has already decided that these same claims of the employees should be denied.

14. Whether the claims of the respondents in this case were extinguished by the negotiated compromise agreement of October 31, 1938, apart from the subsequent award of the Adjustment Board finding that the claims of the respondents were so extinguished.

15. Whether the complaint presents a claim upon which relief may be granted and whether the judgment of the District Court that it did not is correct.

D.

Reasons Relied upon for the Allowance of the Writ.

The decision of the Circuit Court of Appeals in this case conflicts with decisions of this Court, of other circuit courts of appeal and of other district courts, as pointed out in Part B of this petition. There should be uniformity of decisions relating to the power of courts to exercise jurisdiction after the Adjustment Board has rendered an award, as in this case. The legal consequences resulting from compromise agreements concluded in collective bargaining negotiations and adjudicated by the Adjustment Board should be clear and certain. Furthermore, when such collective bargaining compromise agreements have been executed and when the Adjustment Board created by the Railway Labor Act has denied the claims of certain employees as a result of the execution of such a compromise agreement, this Court should determine whether the award of the Adjustment Board is "final and binding." The District Court found that the award was "final and binding." The Circuit Court of Appeals did not even refer to the issue in the case.

The lack of the power of courts to pass upon union jurisdictional issues decided by the Mediation Board created by the Railway Labor Act has been clearly delineated by the decisions of this Court in *Switchman's Union of North America* v. *National Mediation Board,* 64 S. Ct. 95, *General Committee* v. *Southern Pacific R. R. Co.,* 64 S. Ct. 142, and *General Committee* v. *M. K. & T. R. R. Co.,* 64 S. Ct. 146.

The lack of power of courts or the extent of such power and the limit of its exercise, when there is an issue of the award of the Adjustment Board being "final and binding," presents questions of importance to railroads and

to labor unions. The legal consequences of an award of the Adjustment Board under the facts and circumstances in this case likewise present substantial questions of importance.

All railroads and labor unions seek guidance. This Court should clarify the many existing uncertainties and conflicts by granting this petition for a writ of certiorari.

Respectfully submitted,

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, *Petitioner.*

PAUL R. CONAGHAN,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

No. .....

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, a Corporation,

Petitioner,

vs.

G. W. BURLEY, *et al.*,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Report of Opinion.

The opinion of the Circuit Court of Appeals (R. 110-113) is reported in 140 F. 2d 488.

II.

Statement of the Grounds on Which Jurisdiction of This Court Is Invoked.

The jurisdiction of this Court is invoked in accordance with the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 USCA 347) and as more particularly set forth in Part B of the preceding petition.

III.

Statement of the Case.

A concise statement of the case is made in the preceding petition under Part A.

IV.

Specification of Errors Assigned and Intended to be Urged

The Circuit Court of Appeals erred:

1. In reversing the judgment of the District Court and remanding this case to the District Court with instructions.

2. In not affirming the judgment of the District Court in favor of your petitioner.

3. In omitting to pass upon or make any reference to the issue in this case as to whether awards of the Adjustment Board are "final and binding."

4. In exercising its jurisdiction in any respect with reference to the suggested issues. When the Adjustment Board entered its award and denied the claim of the Brotherhood under the facts and circumstances in this

case, the award of the Adjustment Board is "final and binding." Courts lack power to consider as issues *de novo* in a new suit at law the same issues presented before the Adjustment Board.

5. In rendering its decision that whether collective bargaining agents of the Brotherhood of Railroad Trainmen, who for many years have acted for the employees of your petitioner in conducting collective bargaining negotiations, must present to your petitioner evidence of "the authority of the so-called agents of the plaintiffs to negotiate, compromise or settle plaintiffs' claims . . ."

6. In holding that there was presented in this case a disputable question of fact for jury determination when the Adjustment Board had previously passed upon the same issues and rendered its award denying relief.

7. In omitting to find *as a matter of law* that the award of the Adjustment Board was "final and binding" upon the respondents.

V.

ARGUMENT.

A.

The Adjustment Board in its award denied the claim of the Brotherhood for pay at time and one-half from August 27, 1934 until November 14, 1938. That award of the Adjustment Board is final and binding upon the respondents.

The claim of the Brotherhood of Railroad Trainmen filed before the Adjustment Board on behalf of the respondents in this case (all members of the Brotherhood)

was for the alleged violation by your petitioner of Artic
6 of its labor agreement with the Brotherhood and for

> "one days' pay at time and one-half for . . . each da
> they were required to work in yard service in th
> Whiting (Standard Oil Company) Yard . . . from th
> dates of August 27, 1934, until November 14, 193
> inclusive" (R. 26).

The Adjustment Board rendered its award (R. 26 to 3
inclusive) and denied the claim (R. 39). The issue
whether the respondents (as individuals) for the sam
alleged violation and the same claims (R. 5, 98) may obtai
court adjudication by filing an independent action at la
in the District Court alleging diversity of citizenship an
damages in excess of $3000 for each respondent and als
whether the award of the Adjustment Board may be urge
as a bar.

Your petitioner contends that under such facts and ci
cumstances, courts have no power to exercise their juri
diction. The Railway Labor Act expressly limits th
power of courts directly or indirectly to review decisio
of the Adjustment Board. (*Washington Terminal Co*
pany v. *Boswell, et al.*, 124 F. 2d 235, affirmed 63 S. C
1430.) Congress has not given to courts the power t
decide jurisdictional controversies between unions an
railroads (*Switchman's Union of North America* v. *N*
tional Mediation Board, 64 S. Ct. 95, *General Committ*
v. *Southern Pacific R.R. Co.*, 64 S. Ct. 142, *General Co*
mittee v. *M. K. & T. R. R. Co.*, 64 S. Ct. 146. Neither ha
Congress given to courts the power to exercise their juri
diction after the very same issues have been decided b
the Adjustment Board in favor of the railroad relatin
to the facts and circumstances in this case. When Co
gress stated in Section 153(m) of the Railway Labor A
(45 USCA) that awards of the Adjustment Board sha
be "final and binding," provided they are not mone

awards, and provided no court review of such awards when they were in favor of the railroad, the expressed intention of Congress is clear that the existence of jurisdiction by courts generally to entertain other forms of suit on the same issues is denied. *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen, et al.*, 140 F. 2d 35; *Virginian Railway Co.* v. *System Federation No. 40*, 131 F. 2d 840, 844, 300 U. S. 515, 548; *Smith et al.* v. *Texas & N. O. R. Co.*, 32 F. Supp. 1013, 118 F. 2d 75; *Division 25, Order of Ry. Conductors of America* v. *Gorman, et al.*, 133 F. 2d 273; *System Federation* v. *Louisiana Ry. Co.*, 30 F. Supp. 909, 32 F. Supp. 89, 119 F. 2d 509, and *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235, 63 S. Ct. 1430.

Even if courts generally have power to exercise jurisdiction in such cases, courts shall not ignore awards of the Adjustment Board (as did the Circuit Court of Appeals in this case) and must effectuate the clear mandate of Congress as set forth in Sec. 153(m) of the Railway Labor Act that awards of the Adjustment Board are "final and binding." *As a matter of law*, this major issue takes precedence over ancillary issues, real or imagined, which may be before the court for adjudication. When a motion for summary judgment is presented, under such circumstances, the first and *only* question for the court to decide is the manner in which the award of the Adjustment Board may be made "final and binding," as demanded by the Railway Labor Act. This the Circuit Court of Appeals failed to do in the case at bar. For that reason your petitioner prays that a writ of certiorari be issued.

B.

The Decision of the Circuit Court of Appeals Conflicts with the Decisions of this Court and of Other Circuit Courts of Appeal.

In part B of the preceding petition there is pointed out the conflict of the decision of the Circuit Court of Appeals in this case with the decisions of this Court and of other circuit courts of appeal. There should be no such conflict on a question of such importance. This Court should obviate the cause for diversity of opinions by granting the petition for a writ of certiorari in this case.

C.

The Decision of the Circuit Court of Appeals Destroys Collective Bargaining.

There is set forth in part B of the preceding petition, also, the point that if the decision of the Circuit Court of Appeals is not reversed, collective bargaining between representatives of railroads and unions will be destroyed. If railroads in every case must apply common law principles of agency and be certain of "the authority of the so-called agents of the plaintiffs to negotiate, compromise and settle plaintiffs' claims . . ." (Opinion, R. 112), bargaining of necessity will become individual and cease to be collective. The result will violate the provisions of the Railway Labor Act making collective bargaining mandatory. The result also will be contrary to the decisions of this Court that the railroads must treat with the designated representative of the employees and imposing the duty "to treat with no other." (*Virginian Railway Co.* v. *Federation*, 300 U. S. 515.) For this reason alone, the petition for a writ of certiorari should be granted in this

case before the effect of the decision of the Circuit Court of Appeals becomes general.

CONCLUSION.

Apart from the history of the Railway Labor Act, statutory construction and the legalistic argument that might be urged, the judgment of the Circuit Court of Appeals in this case should be reviewed by certiorari because of a "practical concept of what is just."

Furthermore, the harm which will be done by that decision in creating greater confusion among the circuit and district courts regarding the construction of the Act, in subjugating to courts the principles which Congress clearly stated to be immune and independent of judicial legislation, in passing over the terminal point where disposition should be finally made of grievances and the opening of a new field of procedure after processing before the Adjustment Board, in relegating to mere disputation the question whether awards of the Adjustment Board are "final and binding" and in the erosion of true collective bargaining by the impact of technical rules of agency—impel the conclusion that in this case certiorari should be granted.

Respectfully submitted,

PAUL R. CONAGHAN,
Counsel for Petitioner.

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
a Corporation,
Petitioner,

vs.

G. W. BURLEY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief for Petitioner.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

I.

Report of Opinion.

The opinion of the Circuit Court of Appeals (R. 110-113) is reported in 140 F. 2d 488.

II.

Statement of the Grounds on which Jurisdiction of th Court is Invoked.

The jurisdiction of this Court is invoked in accordan with the provisions of 240(a) of the Judicial Code, amended by the Act of February 13, 1925 (28 USCA 347 as more particularly set forth in Part B of the petiti for a writ of certiorari filed herein.

III.

Statement of the Case.

In an amended complaint filed in the District Court the United States for the Northern District of Illino Eastern Division, on November 2, 1942 (R. 96), the t respondents alleged diversity of citizenship and that t petitioner violated Article 6 of the labor agreement f yardmen between the petitioner and the Brotherhood Railroad Trainmen. The damages alleged by each r spondent varied from $3,500.00 to $14,000.00. The tot *ad damnum* was $65,274.00 (R. 98). . All responden were yardmen employed by the petitioner and membe of the Brotherhood of Railroad Trainmen (R. 4).

The complaint alleged that the petitioner ordered i train crews to commence work in the Whiting (Indian switch yard either before or after the times specified the labor agreement (R. 4) for starting train crews a that as a result of these alleged violations, each respon ent (R. 5) is "entitled to pay for an additional day, time and one-half, at the regular daily rate from Augu 26, 1934, to and including November 14, 1938, for ea foreman and each helper, for each day they were requir to work in yard service in the 'Whiting Yard' of t defendant, in accordance with the established practi

among railroads and employees thereof, and as provided in said Article 6 of said agreement as aforesaid."

The petitioner filed a motion to dismiss the original complaint (R. 9-39 inclusive) and also a motion for summary judgment (R. 42). The District Court rendered summary judgment for the petitioner (R. 84), from which an appeal was taken to the Circuit Court of Appeals (R. 85-86).

The Circuit Court of Appeals reversed the judgment of the District Court because of jurisdictional defects relating to diversity of citizenship (*Alderman* v. *Elgin, Joliet and Eastern Railway Company*, 125 F. 2d 971). In its directions, however, the Circuit Court of Appeals permitted the District Court to allow amendments to cure the jurisdictional defects. The amended complaint curing the jurisdictional defects thereafter (November 2, 1942) was filed by the respondents in the District Court (R. 96-98).

The District Court again entered summary judgment for the petitioner (R. 99-100). The respondents again appealed to the Circuit Court of Appeals. That Court in its opinion now before this Court for review (R. 110-113) found that the "record affirmatively shows there was an issue of fact" which should have been submitted to the jury and that "the motion for summary judgment should not have been granted" by the District Court. The judgment of the District Court again was reversed and the cause remanded with instructions (R. 113).

For many years prior to 1934, the intra-plant switching of Standard Oil Company refineries at Whiting, Indiana was performed by train crews employed by that company. On July 27, 1934, and subsequently to date, this intra-plant switching was performed by the petitioner. Yard crews employed by Standard Oil Company prior to July 27, 1934, were ordered to commence work each day at hours fixed in advance by plant management. These hours

varied from time to time, according to the demands of manufacturing operations (R. 32-33). Crews employed by the petitioner at all yards in Indiana and Illinois commenced work each day at hours which had been fixed many years prior to 1934, as set forth in Article 6 of the labor agreement between the petitioner and the Brotherhood for yardmen relating to "rules", working conditions and "rates of pay" (R. 4).

On November 23, 1936, the Brotherhood of Railroad Trainmen, the designated representative of all of the yardmen employed by the petitioner, filed a complaint before National Railroad Adjustment Board alleging that the petitioner had violated Article 6 of the labor agreement (R. 13). This complaint was assigned by the Board as Docket No. 3537 (R. 14).

On October 28, 1938, the President of the petitioner "settled" twenty-four "cases" or grievances with the designated representatives of the Brotherhood of Railroad Trainmen, after collective bargaining conferences with them as required by the provisions of the Railway Labor Act. These conferences were required also by the provisions of the labor agreement between the petitioner and the Brotherhood. The letter of the President of the petitioner (R. 16-23) proposing settlement and compromise of these cases, some of which were then pending before the National Railroad Adjustment Board, included Case No. 5, Board Docket No. 3537, the claim of the Brotherhood that Article 6 of the labor agreement had been violated.

That letter of settlement and compromise "accepted for the yardmen" on October 31, 1938, by the General Chairman and Secretary of the Brotherhood (R. 23), in part provided:

> "Case No. 5—Labor Board docket No. 3537—Starting Time of Switch Engines in Whiting S. O. Yard.
>
> "Settled by agreement that the starting times, for a ninety day trial period commencing November 15th,

1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employes claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in satisfaction to our employes and to the industry served, then representatives of the Railway Company and representatives of the Yardmen and representatives of the Engineers and representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry. (R. 17.)

* * * * *

"We have by this letter given you a complete resume of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employees whom you represent and have proposed in this letter a very liberal disposition of all of the cases involved. The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending either before the Board, or under discussion with this office except Case No. 4, which it is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement.

Yours truly,

(Signed) S. M. ROGERS,
President.

Accepted for the Yardmen: Oct. 31, 1938
(Signed) C. H. WILLIAMS,
General Chairman, B. of R. T.

(Signed) S. F. JOHNSON,
Secretary, B. of R. T."
(R. 23.)

On the same day, a letter was addressed to the Secretary of the National Railroad Adjustment Board by the President of the petitioner and the General Chairman of the Brotherhood (R. 24-25) advising the Board that certain cases then pending before it "have been settled and we, therefore, jointly request that they be withdrawn from the Docket of the Board (R. 24)." Included in the cases pending before the Board which the parties agreed had been "settled" and which the parties requested be withdrawn from the docket of the Board, was the case represented by the Board's Docket No. 3537 (R. 24), the claim of the Brotherhood that Article 6 of the labor agreement had been violated. On the same day, the President of the petitioner, Mr. A. F. Whitney, President of the Brotherhood, and the General Chairman of the Brotherhood were advised by the Board (R. 25-26) that Case No. 3537 and others were removed from the docket as requested.

Notwithstanding the execution of the settlement agreement on October 31, 1938, and the dismissal of the claim of the Brotherhood that the petitioner had violated Article 6 of the labor agreement, then pending before the Board, by a joint letter to the Board advising it that the case had "been settled" (R. 24), the Brotherhood on April 18, 1939 filed a second complaint before the Board (R. 71). This complaint was docketed as Case No. 7324 (R. 69) and in part stated: "Claim for one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article No. 6 of the Yardmen's Agreement of the Elgin, Joliet & Eastern Railway Company, effective January 1, 1927, and applicable to Whiting (Standard Oil Company) Yardmen, July 27, 1934, from dates of August 27, 1934, until November 14, 1938, inclusive" (R. 71).

On September 6, 1940, the Board in Docket No. 7324 issued its findings and award (R. 26-39) in part as follows:

> "The evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28th, 1938, accepted by employes October 31, 1938.
>
> AWARD.
>
> Claim denied per Findings.
>
> NATIONAL RAILROAD ADJUSTMENT BOARD
> By Order of First Division
> Attest: (Sgd.) T. S. MCFARLAND,
> *Secretary.*"
> (R. 39.)

On November 19, 1940, the respondents filed their complaint in the District Court of the United States for the Northern District of Illinois, Eastern Division, subsequently amended as aforesaid.

The petitioner moved to dismiss (R. 9, 99) and for summary judgment (R. 42, 100) in the District Court for the reasons that (1) the Brotherhood of Railroad Trainmen, the exclusive bargaining representative for the respondent yardmen, and of which all of the respondents were members, "settled" the matter in dispute by the written agreement on October 31, 1938 (R. 16-23), (2) the said written agreement "accepted for the yardmen" released all claims of the respondents against the petitioner arising out of the alleged violations of Article 6 of the labor agreement between the Brotherhood and the petitioner and (3) the decision of the National Railroad Adjustment Board, First Division, on September 6, 1940 (R. 26-39) denying the claim of the Brotherhood filed for the benefit of the yardmen for the alleged violation of Article 6 of the labor agreement is "final and binding" upon the respondents.

IV.

Specification of Errors Assigned and Intended to be Urged.

The Circuit Court of Appeals erred:

1. In reversing the judgment of the District Court and in remanding this case to the District Court with instructions.

2. In not affirming the judgment of the District Court in favor of the petitioner.

3. In omitting to pass upon or make any reference to the issue in this case as to whether the award of the Adjustment Board is "final and binding."

4. In exercising its jurisdiction in any respect with reference to the suggested issues. When the Adjustment Board entered its award and denied the claim of the Brotherhood under the facts and circumstances in this case, the award of the Adjustment Board is "final and binding." The District Court in the new suit at law for damages lacked power to consider issues *de novo.*

5. In rendering its decision that whether collective bargaining agents of the Brotherhood of Railroad Trainmen, who for many years prior to and at the times in question were the exclusive designated representatives of the yardmen of the petitioner in conducting collective bargaining negotiations, must present to the petitioner evidence of "the authority of the so-called agents of the plaintiffs to negotiate, compromise or settle plaintiffs' claims . . . ."

6. In holding that there was presented in this case a disputable question of fact for jury determination when the Adjustment Board previously had rendered its award denying the same claims presented for the yardmen now respondents in this case.

7. In omitting to find *as a matter of law* that the award of the Adjustment Board was "final and binding" upon the respondents.

V.

The Summary of Argument.

The award of the Adjustment Board of September 6, 1940 denied the claim of the Brotherhood for additional pay at time and one-half for each day worked from August 27, 1934 until November 14, 1938. That award is final and binding upon the respondents, the petitioner and the District Court in this proceeding. Section 153 (m) of the Railway Labor Act (45 USCA) provides that such awards "shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." The award of the Board was not a money award because it did not include "a requirement for the payment of money" as stated in Section 153 (o) of the Act.

The claim before the Board was the same as the liability predicated in the complaint in the case at bar. Neither the claim filed before the Board nor the complaint filed in the District Court assert liability for overtime or back wages. The respondents were paid for the time worked. The claims relate only to *penalty* damages.

All procedural requirements of the Railway Labor Act were followed. The respondents were heard before the Board by their designated representatives. The District Court had no power to exercise its jurisdiction. By the Railway Labor Act, Congress deprived courts of power to pass upon issues in this case. Summary judgment for the defendant was correctly entered by the District Court. This Court should affirm.

The authority of the Brotherhood Chairman to file the claim before the Board is granted to him by the provisions of the Railway Labor Act as a designated representative of the respondents. That authority is not limited by technical rules of agency, as stated in the opinion of the Circuit Court of Appeals. Thus there was no issue of fact for jury determination. The Railway Labor Act removed the issue from the scope of court adjudication. The award of the Board is the terminal point of the grievance and is "final and binding" upon this Court in this case.

The collective bargaining agreement of October 31, 1938, signed by the President of the petitioner and the General Chairman and Secretary of the Brotherhood, deprived the respondents of all claims against the petitioner for the alleged violation of Article 6 of the labor agreement. If the respondents in this case, more than two years after the execution of this compromise agreement, may deny the authority of their designated representatives to act for them in the execution of this agreement and present this issue as a justiciable controversy, as in the case at bar, after the Adjustment Board has examined the compromise agreement and given legal effect to it, then collective bargaining is meaningless and the Railway Act is "a dead letter." Neither the rules and the by-laws of the Brotherhood nor the by-laws and resolutions if adopted by the Board of Directors of the petitioner can limit the mandatory provisions of the Railway Labor Act or nullify compromise agreements executed by designated representatives of the respondents and of the petitioner, in accordance with the provisions of the Act.

The labor agreement between the petitioner and the Brotherhood provided that "any controversies arising as to the application of the rules herein agreed upon . . . shall be taken up . . ." by the General Committee with the General Superintendent, "and in the event of their failure

to agree upon a satisfactory settlement, the Committee may appeal to the Vice President." Thus, the petitioner was required by its labor agreement as well as by the Railway Labor Act to treat only with the General Committee of the Brotherhood after the grievances had been appealed to the General Superintendent or to the Vice President.

The Court should not exercise jurisdiction in this case because the respondents failed to exhaust their remedies before tribunals of the Brotherhood relating to the alleged want of authority of the Brotherhood officials in executing the compromise agreement of October 31, 1938 and in filing the claim before the Board upholding that collective bargaining agreement. The failure of the respondents to exhaust their remedies before the Brotherhood tribunals prevents court adjudication.

The District Court correctly entered summary judgment for the petitioner. The law is clear that the District Court has the right to consider facts presented by affidavits or exhibits in support of a motion to dismiss and in support of a motion for summary judgment. There was no question regarding the truth of these affidavits and exhibits. *Their truth is admitted.*

There is no question arising under the due process clause of the Fifth Amendment. The respondents could have filed an action in court and could have obtained judicial determination of the issues presented. The fact that they did not elect to do so does not present a constitutional question for this Court to determine. Furthermore, by collective bargaining, all claims of the respondents for a violation of Article 6 of the labor agreement were extinguished by the compromise agreement of October 31, 1938. Therefore, the complaint in the case at bar did not state a cause of action upon which relief could be granted. This presents no constitutional question. The District Court correctly entered summary judgment for the petitioner.

VI.

ARGUMENT.

A.

The award of the Adjustment Board of September 6, 1940 denied the claim of the Brotherhood for additional pay at time and one-half from August 27, 1934 until November 14, 1938. That award is final and binding upon the respondents.

All respondents in this case are members of the Brotherhood (R. 4). The Brotherhood claimed that the petitioner violated Article 6 of its labor agreement relating to yardmen and on April 18, 1939, asked the Board (R. 71) to enter an award for

> "one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article 6 of the Yardmen's Agreement of the Elgin, Joliet and Eastern Railway Company, effective January 1, 1927, and applicable to Whiting (Standard Oil Company) Yardmen, July 27, 1934, from the dates of August 27, 1934, until November 14, 1938, inclusive."

This claim is the same as the liability predicated by the complaint in the case at bar.

The respondents were paid for the time worked. The claim filed before the Board and the complaint filed in the District Court assert no liability for overtime or back wages. Each seeks *penalty* damages (R. 80, 83).

After briefs were filed by the Brotherhood and by the petitioner, the Board, on September 6, 1940, entered its award (R. 26-39) which concluded (R. 39) as follows:

> "The evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28th, 1938, accepted by employes October 31, 1938.
>
> Award.
>
> Claim denied per Findings."

The petitioner claims that this award is "final and binding" upon the respondents in this case and a bar to their recovery. Furthermore, it deprives courts of jurisdiction.

The Circuit Court of Appeals in its opinion (R. 110-113) did not pass upon these issues, although requested to do so.

The District Court, however, found (R. 83) that

> "there was no adverse relationship between the Brotherhood and these plaintiffs in that proceeding before the Board, and I think that the controversy was submitted to the Board, that it had jurisdiction and that it was decided, and that the plaintiffs were represented there and were bound thereby. . . . I think the ruling of the Adjustment Board was binding upon the plaintiffs as well as upon the defendant and that it is binding upon this court in this proceeding."

The Railway Labor Act, 45 USCA, Section 153(m) in part provides:

> "The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award."

The award of the Adjustment Board was not a "money award" within the meaning of the Railway Labor Act.

The award did not direct the petitioner to pay money. Paragraph (o) of the same section of the Railway Labor Act in part provides that:

> "if the award includes a requirement for the payment of money", "the division of the Board shall make an order, directed to the carrier, to make the award effective and . . . to pay to the employee the sum to which he is entitled under the award on or before a day named."

The Railway Labor Act itself clearly indicates that a "money award" is an award which "includes a requirement for the payment of money" and that *if the award does not include such a requirement*, it is not a "money award" within the meaning of paragraph (m) of the Act.

Section 153 (i) of the Railway Act provides:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Paragraph (j) of the same section provides that the parties may be heard either in person, by counsel, or by "other representatives, as they may respectively elect . . ."

Paragraph (k) in part provides:

> "That final awards as to any such dispute must be made by the entire division as hereinafter provided."

Paragraph (l) provides that upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority of the members, a referee may be selected "to sit with the division as a member thereof and make an award." Such an award was made in the case at bar.

Full compliance was made with all procedural requirements of the Railway Labor Act. The respondents in the case at bar were heard before the Board by their designated representatives, as provided by the Act. Notice to the duly constituted officers of the Brotherhood is sufficient to bind the respondents. *Estes, et al.*, v. *Union Terminal Co.*, 89 F. 2d 768. Therefore, the award of the Board is "final and binding" upon the petitioner and the respondents here.

The respondents, however, seek to obtain indirectly what the Railway Labor Act prohibits. There is no provision in the Act for court review of an award of the Board when that award is in favor of the carrier and in opposition to the claims of the employees. The clear intention of Congress is that there should be no court adjudication or review, directly or indirectly, in such a case (*Washington Terminal Company* v. *Boswell, et al.*, 124 F. 2d 235, affirmed 319 U. S. 732). The Court (124 F. 2d 235) at page 244 stated:

> "We think, therefore, that Congress intended the Board to be and to act as a public agency, not as a private go-between; its awards to have legal effect, not merely that of private advice. It intended the employees, when successful before the Board, to have definite and substantial probative and financial advantages in suits to enforce awards, which they cannot have in other suits. Because this is so, and because the Act gave the employees two years in which to sue for enforcement, we think Congress intended the courts during that period to keep hands off these controversies except in the manner specified in the

Act. This would be true if it were necessary to regard the issue now presented as involving the existence of jurisdiction to entertain other forms of suit. It is equally true, when the issue is considered as presenting a question of sound judicial discretion in declining to exert jurisdiction, more especially since this is a suit for a declaratory judgment. To permit maintenance of this suit would short-circuit both the administrative proceeding and the special statutory suit. It would make the Railway Labor Act a dead letter so far as legal effect is concerned, perhaps also as a 'voluntary, private system of negotiation.' So far as the intention of Congress goes, therefore, we cannot believe these results were contemplated."

In the case of *Berryman* v. *Pullman Co.*, 48 F. Supp. 542, a discharged Pullman porter, through the designated representatives of the Brotherhood of Sleeping Car Porters, presented his claim for back wages and reinstatement to the officials of the company and then to the Adjustment Board, as required by the Railway Labor Act. The Adjustment Board denied the plaintiff's claim. This award was claimed by the defendant in a motion for summary judgment to have finally settled the controversy. The Court at page 543 stated:

"The award of the Adjustment Board contained no money award. It did determine that plaintiff was discharged because of and as a result of his own misbehavior. That finding is made final by the statute. There is no room for a subsequent inquiry into the same question by the Courts. But by the present action plaintiff seeks to have the Court do just that. He voluntarily submitted the dispute to the Adjustment Board, got its decision and cannot now ignore it."

The motion for summary judgment for the defendant was sustained.

To permit courts generally to exercise their jurisdiction after the Board has entered its award in favor of the

railroad and against the Brotherhood representing the yardmen in circumstances similar to the case at bar not only would violate the clear provisions of the Act but also would disregard the legislative history of that Act and the preceding legislation. The first act dealing with railway labor in 1888 and all subsequent legislation prior to the 1934 amendments to the Railway Labor Act of 1926 contain no provision which made awards of adjustment boards final and binding. (See first annual report of the National Mediation Board, including the report of the National Railroad Adjustment Board for the fiscal year ended June 30, 1935.)

The 1934 amendments creating the National Railroad Adjustment Board and paragraph (m) in question indicated the clear intention of Congress that when the claim of the designated representatives of a class or craft of employees could not be "adjusted" with officers of the railroad and when such a claim was "referred" to the Adjustment Board, and the Board handed down its award denying the claim, such award was intended to be "final and binding upon both parties to the dispute."

No procedure for court review is provided for by the Act. It is clear, therefore, that in such a case Congress intended that the award of the Board should be the terminal point of the grievance. If the respondents in the case at bar may now obtain unlimited court adjudication of their claims by a trial *de novo*, the expressed intention of Congress will be nullified.

Since the award of the Board in this case is "final and binding", it follows that the District Court had no power to exercise its jurisdiction. As stated by the District Court, the award of the Board was binding upon that Court "in this proceeding." By the Railway Labor Act, Congress deprived courts of power to pass upon issues in the circumstances of the case at bar. Therefore, there was no

issue of fact for jury determination. As a matter of law, the Railway Labor Act has made the award of the Board "final and binding." All issues in this case are thereby removed from court adjudication. The summary judgment for the defendant was rightly entered by the District Court and should be affirmed.

The respondents claim that the Chairman of the Brotherhood exceeded his authority in filing the claim before the Board on April 18, 1939. The prior claim (Docket No. 3537) filed by him with the Board on November 23, 1936 (R. 13, 14), "settled" on October 31, 1938, and then withdrawn from the docket of the Board, they admit was filed by the Brotherhood Chairman with their authority (R. 48). However, the second claim was "referred" to the Board by the Brotherhood Chairman in the same manner as many prior claims against the petitioner had been "referred" by him to the Board. The Secretary of the Board followed his customary practice and on May 18, 1939, gave notice to the President of the petitioner and also to Mr. A. F. Whitney, President of the Brotherhood, that the claim was "referred" to the Board (R. 69).

Ostensible authority should guide the Board and this Court in reviewing the actions of the Brotherhood Chairman. Furthermore, by paragraph (i) of the Act, hereinbefore quoted, the Brotherhood Chairman is granted authority to refer the dispute to the Board for its award.

In *Virginian Railway Co.* v. *System Federation No. 40*, 131 F. 2d 840, 844, the Court stated:

> "Indeed, Congress, by the terms, philosophy and history of the Act, seems to have turned to the representatives (which are normally labor unions) of the employees as the usual agents for attempting to settle controversies arising under the Act and for enforcing the awards of the Board. Again, the analogy of the National Labor Relation Act, 29 U.S.C.A. § 151 *et seq.*, has persuasive force here."

In the case of *Division 525, Order of Ry. Conductors of America* v. *Gorman, et al.*, 133 F. 2d 273, the Court at page 278 stated:

> "The defendants assert that they have dealt with the designated representative of the Order, that they did this in entering into the contract of March 3, 1941, and they dealt with the same designated representative when they entered into the contract of November, 1941, terminating the contract, and that having so done they have complied with the law and that they had a right to assume that O. L. Coulter, the general Chairman, was acting with full authority and that agreements with him were valid. They say: 'If such an agreement can be set aside by individual lodges or members of the Order, then railroads can never enter into an agreement with the Order as bargaining agent and the whole system of collective bargaining on the part of the employees, provided by the Railway Labor Act, will de destroyed.'
>
> It appears without dispute that the defendants have dealt with the representative of the Order in effecting the collectively bargained agreements, and they cannot be required to examine into the specific authority granted the representative of the Order."

If the petitioner is required to act at its peril regarding the authority of the General Chairman of the Brotherhood to represent the yardman, for whom he is the designated representative within the meaning of the Railway Labor Act, then the question of specific instructions by employees to the designated representative will be present in every case "referred" to the Board and also in every case "handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes," as provided in paragraph (i).

If the authority of the designated representative is questionable by either the employees or the employer in every case "referred" to the Board and in every step

of the grievance procedure, collective bargaining made mandatory by the Railway Labor Act will be destroyed. The result will be that the petitioner and other railroads may not "treat" with the designated representatives of the Brotherhood or of other unions, unless and until "the authority of the so-called agents of the plaintiffs to negotiate, compromise and settle plaintiffs' claims for damages for the violation of Article 6" or for the alleged violation of any labor agreement has been clearly established regarding respective amounts claimed by each particular employee affected, as required by the opinion of the Circuit Court of Appeals (R. 112).

The stopping of each collective bargaining conference for the purpose of establishing agency between the designated representatives and the particular employees and the delay in each proceeding "referred" to the Board, for the purpose of establishing this agency and the scope of authority of the designated representatives, will necessarily make collective bargaining too complicated for administration and illusory. Apart from the administrative difficulties, the mandatory provisions of the Act, as regards the petitioner "imposes the affirmative duty to treat only with the true representative, and, hence, the negative duty to treat with no other." (*Virginian Railway Co.* v. *Federation*, 300 U. S. 515, 548.) In addition, the Act (45 USCA 152, Second) imposes the duty upon the petitioner and the designated representatives to consider and, if possible, to decide all disputes "with all expedition."

Furthermore, Rule No. 10 of the "Constitution and General Rules of the Brotherhood of Railroad Trainmen" presented to the District Court for its consideration prior to ruling on the motions to dismiss and for summary judgment, and presented also to the Circuit Court of Appeals, provides in part that:

> "Whatever action may be taken by the General Grievance Committee or Board of Adjustment of any system within the meaning of the above General Rules shall be law to the Lodges on that road until *and unless reversed by the* Board of Appeals, and if any member refuses to vote or abide by the action of such General Grievance Committee or Board of Adjustment, he shall be expelled from the Brotherhood for violation of obligation."

Therefore, the ostensible authority of the Brotherhood Chairman in filing the claim before the Board, Section 153 (i) and (m) of the Railway Labor Act and Rule No. 10 of the Brotherhood authorized the filing of the claim before the Board on April 18, 1939. The subsequent award of the Board denying relief is final and binding upon the respondents, the petitioner and the courts in this proceeding.

B.

The collective bargaining agreement of October 31, 1938, signed by the President of the petitioner and the General Chairman and Secretary of the Brotherhood, deprived the respondents of all claims against the petitioner for the alleged violation of Article 6 of the labor agreement.

The pertinent provisions (R. 17, 23) of the collective bargaining agreement are set forth on pages 4 to 5 of this brief.

This compromise agreement is typical of collective bargaining required by the Railway Labor Act. The agreement made final disposition of thirty-eight cases, some of which had been referred to the Board by the Brotherhood. Approximately seventy-two employees benefited by the settlements. All cases relate to rates of pay, rules and working conditions. The intention of the parties as expressed in the agreement is clear and unambiguous.

The agreement was intended to be "a complete settlement" of case No. 3537 then pending before the Board and provided "that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of the settlement."

On the date of its execution, the parties advised the Board that the case docketed as No. 3437 had been "settled" and jointly requested that it be withdrawn from the docket of the Board (R. 24). The President and General Chairman of the Brotherhood and the President of the petitioner were thereupon advised by the Secretary of the Board that the case had been withdrawn from the Board's docket (R. 25).

In addition to the parties advising the Board that the case docketed as No. 3537 had been "settled," the Board itself, in the award of September 6, 1940 (R. 26-39), found that the compromise agreement of October 31, 1938 disposed of all claims filed on April 18, 1939 (R. 71), by the designated representative of the respondents in Board's Docket No. 7324. These claims are the same as those presented by the respondents in the case at bar. The finding of fact by the Board to the effect that the parties "disposed of the claim here made by the letter of the carrier, dated October 28, 1938, accepted by the employees October 31, 1938" (R. 39) is binding on courts in this proceeding.

The Railway Labor Act (45 USCA 152) in part provides:

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of

any carrier growing out of any dispute between the carrier and the employees thereof.

. . .

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

. . .

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: . . .

. . .

"Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, . . . The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

. . .

"Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending

> shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of said paragraphs of this section shall constitute a separate offense. . . ."

Thus, in executing the compromise agreement of October 31, 1938, the parties merely carried out the duties imposed upon them by the Act "to settle all disputes" "concerning rates of pay, rules, and working conditions," and that all "disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference by the representatives designated and authorized so to confer. . . ."

The petitioner, its officers or agents are subject to severe fines and imprisonment, or both, for each offense each day the petitioner, its officers or agents wilfully fail or refuse to comply with the duties imposed by section 152 of the Act. If the carrier, as the petitioner here, concludes a collective bargaining agreement with the designated representatives of the employees and more than two years later those employees, as the respondents here, may deny the authority of the designated representatives to act for them in the execution of the agreement and if they may litigate the claim in courts after the Adjustment Board has denied them, collective bargaining is meaningless and the Railway Labor Act is "a dead letter." The rules and by-laws of the Brotherhood, even if they did apply to the actions of the General Chairman and Secretary of the Brotherhood in this case, cannot limit the compulsory requirements of the Act. Nor could a by-law or resolution of the Board of Directors of the petitioner limit them. The mandatory provisions of the Act are supreme.

Article 25 of the agreement between the petitioner and its yardmen requires that "any controversies arising as

to the application of the rules herein adopted" shall be taken up by the "General Committee" of the Brotherhood. Thus, treating with the designated representatives is required by the collective bargaining agreement as well as by the Railway Labor Act.

The labor agreement between the defendant and the Brotherhood (Exhibit "H," filed in the District Court and in the Circuit Court of Appeals), upon which the plaintiffs predicate liability, refers to the procedure for the "handling" of grievances. Local lodges or local grievance committees of the Brotherhood have no authority to "take up" grievances with the General Superintendent or the Vice President of the defendant. By the terms of the labor agreement, this power is given only to the General Grievance Committee of the Brotherhood on the Elgin, Joliet and Eastern Railway System, of which C. H. Williams was General Chairman and S. F. Johnson was Secretary. These persons in their official capacities signed the compromise agreement of October 31, 1938.

The defendant is bound by the provisions of its labor agreement with the Brotherhood and by the provisions of the Railway Labor Act. The compulsory provisions of that Act requiring the defendant "to settle all disputes," if possible, with the designated representatives of the Brotherhood culminated in the settlement agreement of October 31, 1938. This was in compliance with the provisions of the labor agreement and of the Act. The award of the Board found that the agreement "disposed" of the claims upon which the respondents now seek to recover. The claims of the respondents asserted more than two years after the execution of the compromise agreement cannot override the provisions of the labor agreement between the petitioner and the Brotherhood that grievances "shall be taken up" by the General Committee and not by the respondents individually. Nor can they override

the duties imposed by the Railway Labor Act upon the petitioner and the respondents' designated representatives "to settle all disputes."

In *Donovan* v. *Travers, et al.* (Sup. Jud. Ct. of Mass. 1934), 285 Mass. 167, 188 N. E. 705, the Court at page 707 stated:

> "The substantial issue is whether the rights of the plaintiffs are fixed by the terms of the agreement between the union and the railroad as it stood when the several plaintiffs entered upon their service interpreted only in the light then available; or whether as the agreements changed from time to time, the modifications and possible changes in interpretation of terms agreed upon by the union and the railroad modified and affected the individual contracts of those already in the railroad's employ. We think the latter to be the proper position. The transaction is an agreement between an employer and a labor union designed by the latter to benefit itself and those members who enter the employer's service. The employee stands no higher than the union. If it modifies the agreement with the employer, the employee must acquiesce. In no correct sense is the union an agent. It is a principal."

When a compromise agreement is executed with the designated representatives of the employees, all employees, as the respondents here, are bound thereby. *Smith et al.* v. *Texas & N. O. R. Co.*, 32 F. Supp. 1013, 118 F. 2d 75; *Division 525, Order of Railway Conductors* v. *Gorman et al.*, 133 F. 2d 273; *System Federation* v. *Louisiana Ry. Co.*, 119 F. 2d 509.

In the *Smith* case, the agent-telegrapher's children sought to recover from the railroad back wages due the agent-telegrapher who died while his designated representatives were negotiating a compromise agreement. Subsequent to his death, the agreement was concluded providing for pay-

ment of wage losses for those "who now hold the status of employees." The Court at page 1014 states:

> "the plaintiffs now before us and of age, neglected to advise and consult with the representatives of the Order of Railroad Telegraphers before the compromise agreement was had, with the view of protecting specially the rights, if any, of their deceased father. The jurisprudence is persuasive that they were on notice and were represented; and, therefore, their rights were decided at the compromise between the employees as a group and the carrier."

The employee died six months *before* the execution of the compromise agreement allowing back wages. If the rules of common law agency were applicable, as held by the Circuit Court of Appeals in the case at bar, death of the employee revoked the agency and his children would not have been bound by the provisions of the compromise agreement made by the "designated representatives" during collective bargaining negotiations. The Circuit Court of Appeals, however, held that his children were bound by the agreement. The defendant's motion to dismiss was sustained.

This Court should effectuate the intention of the parties as expressed in the compromise agreement of October 31, 1938 to settle all claims relating to Article 6 and providing that "no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement." Apart from any provisions of the Railway Labor Act, the compromise agreement in question arrived at through collective bargaining requires that the claims of the respondent be denied and that the summary judgment entered for the petitioner by the District Court be affirmed.

C.

Courts should not exercise jurisdiction in the case at bar because the respondents failed to exhaust their remedies before the tribunals of the Brotherhood for the alleged want of authority of the Brotherhood officials in executing the compromise agreement of October 31, 1938.

The respondents filed no proceeding before the Adjustment Board to vacate the award of the Board dated November 6, 1940, on account of the alleged want of authority of the Brotherhood officials in filing the complaint in docket No. 7324, or on account of the want of authority by the Brotherhood officials in executing the negotiated compromise agreement of October 31, 1938.

Neither did the respondents file any proceeding before the Brotherhood officials, in accordance with the provisions of the constitution and by-laws of the Brotherhood, seeking to have nullified the authority exercised by the Brotherhood officials in execting the negotiated compromise agreement and subsequently filing a claim before the Adjustment Board in docket No. 7324. Rule 10 attached to the Brotherhood Constitution provides for an appeal to the various tribunals existing for that purpose created by the Brotherhood for any member who is not satisfied with any action taken by the Grievance Committee.

The failure of the respondents to exhaust the remedies open to them within the Brotherhood before seeking relief in court for any wrong alleged to have been committed by the officials of the Brotherhood prevents court adjudication. *Mallory* v. *Carroll* (Supreme Judicial Court of Massachusetts, 1930) 172 N. E. 790, 272 Mass. 524; *Snay* v. *Lovely, et al.* (Supreme Judicial Court of Massachusetts, 1931) 176 N. E. 791; 276 Mass. 159.

The respondents are estopped from repudiating the negotiated compromise agreement of October 31, 1938. *Brisbin* v. *Brotherhood of Railway Clerks* (Supreme Court of Nebraska, 1938) 279 N. W. 277; *Division 525, Order of Ry. Conductors* v. *Gorman, et al.*, 133 F. 2d 273; *Evans, et al.* v. *Johnson, et al.*, 300 Ill. App. 78, 20 N. E. 2d 841, certiorari denied, 309 U. S. 662; *Franklin, et al* v. *Pennsylvania-Reading*, 122 N. J. Eq. 205, 193 A. 712.

D.

The District Court correctly entered summary judgment for the petitioner.

The law is clear that the District Court has the right to consider facts presented by affidavits or exhibits in support of a motion to dismiss and in support of a motion for summary judgment. In the case at bar, there was no question regarding the truth of the facts set forth in the petitioner's affidavits and exhibits. *Their truth is admitted.*

Civil Procedure Rule 12 (b) provides:

> "Every defense, in law or *fact* . . . shall be asserted in the responsive pleading thereto *if one is required*, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter, . . . (6) Failure to state a claim upon which relief can be granted." (Italics ours.)

The law is clear that affidavits may be considered in support of a motion to dismiss. *Moore's Federal Practice Under the New Federal Rules*, Vol. 1, states at page 646:

> "It is to be noted that Equity Rule 29 authorized only defenses in point of *law arising upon the face of the bill* to be made by motion. On the other hand

> Rule 12 (b) authorizes *every* defense in law *or fact* to be made in the responsive pleading, and then authorizes certain of those defenses to be first made by motion, if the party is so advised. The scope of Rule 12 (b) is as broad as the field of defense. Unless a motion may be accompanied by affidavit or make reference to depositions on file in the case its utility is seriously impaired. . . . It would be quibbling to hold that Rule 12 (b) does not authorize a motion raising defense (6) to be accompanied by an affidavit that the statute of limitations had run, or that the claim was barred by *res judicata.*"

Rule 6 (b) of the District Court relates to the service of evidentiary matter in support of or in opposition to motions and clearly contemplates the filing of evidentiary matter in support of a motion to dismiss. Rule 6 (b) in part provides:

> "In serving notice of a motion in support of which *evidentiary matter* is required or intended to be submitted . . . copies thereof shall be served with the notice. Parties opposing the motion shall serve and file . . . *any evidentiary matter or affidavits upon which they intend to rely.*" (Italics ours.)

The Circuit Court of Appeals for the Second Circuit in the case of *Central Mexico Light & Power Co.* v. *Munch*, 116 F. 2d 85, decided that affidavits may be received on a motion to dismiss for want of jurisdiction, and whether the motion is called a motion to dismiss or a motion for summary judgment is not important since the same relief is sought. The court at p. 87 stated:

> "Moveover, in two separate affidavits, he raised the question of jurisdiction, and in one he asked specifically for dismissal on that ground. Plaintiffs' suggestion that Munch is not relying upon this objection surely is not well taken, nor is plaintiffs' objection that the motion to dismiss of the other defendants came too late. It is not important whether

the objection is called a motion to dismiss or one for summary judgment. Since the same relief is sought the difference in name is unimportant. In any event, the affidavits presented are available on either motion."

Mr. Justice Clark in *Palmer* v. *Palmer,* 31 F. Supp. 861, at p. 863, stated:

"The present proceedings arise on defendants' motion for judgment on the pleadings and motion for summary judgment. These are presented as two separate motions, the former dealing only with issues of law on the pleadings and the latter only with whether there were any triable issues of fact in view of the affidavits filed. I see no occasion for treating them as thus distinct. Both motions seek a single relief, judgment for the defendants; in granting that relief I feel I am justified in relying on any or all appropriate grounds disclosed by any or all the papers of record in the case. *United States Trust Co. of New York* v. *Sears,* D. C. Conn., 29 F. Supp. 643, 645."

In the footnote on p. 863 the Court stated:

"If these various motions must be kept in separate compartments, then little has been gained by the abolition of the demurrer, for a hierarchy of objecting proceedings, each calling for separate procedural steps and formal hearings, will then still persist. Logically but one relief is sought; as a matter of practical convenience all appropriate reasons therefor should be advanced and considered as a single step."

The District Court for the Northern District of Alabama in the case of *Alabama Independent Service Station Assn., Inc.* v. *Shell Petroleum Corp.,* 28 F. Supp. 386, at p. 388 stated:

"At this point it may be worth while to advert to the question whether facts appearing in affidavits, depositions and answers to interrogatories may be

considered in the disposition of a motion to dismiss. Rule 12 (b) of the Rules of Civil Procedure provides that 'every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter . . . (6) failure to state a claim upon which relief can be granted . . .' This rule differs significantly from the former Equity Rule 29 in that the latter provided only for 'every defense in point of law arising upon the face of the bill' by motion. We are of the opinion that the affidavits, depositions and answers to interrogatories may be considered here on all the motions, the latter being within the terms of Rule 12 (b) defenses in law *and* fact."

Petitioner's motion to dismiss the complaint may be treated as a motion for summary judgment. Facts set forth in the motion or in documents accompanying the motion need not be sworn to for the purpose of receiving the consideration of the Court.

In the case of *Samara* v. *United States,* Circuit Court of Appeals, Second Circuit, 129 F. 2d 594, the Court at p. 597 stated:

"Upon the trial of his action the question will arise whether he is limited to the evidence presented to the Commissioner. If the present record fairly presents such question, judicial economy will obviously be served by an immediate decision rather than by remanding the case for trial. We think the question is fairly presented, since the defendant's motion to dismiss may be treated as one for dismissal under Rule 12(b) (6) for failure to state a claim, or one for summary judgment under Rule 56(b). See Federal Rules of Civil Procedure, Rules 12 and 56, 28 U.S.C.A. following section 723(c). The new rules have been held to authorize 'speaking' motions, and thus permit the allegations of the complaint to be

supplemented by the certified copies of the claim for refund and the letters of the Commissioner, annexed to the motion, the correctness of which is not disputed. See *Gallup* v. *Caldwell*, 3 Cir., 120 F. 2d 90, 92; *Cohen* v. *American Window Glass Co.*, 2 Cir., 126 F. 2d 111, 114."

In the case of *Victory* v. *Manning*, 128 F. 2d 415, the defendant filed a motion to dismiss and attached to his motion photostatic copies of letters unaccompanied by any affidavits. The Circuit Court of Appeals, Third Circuit, held this to be proper and at p. 417 stated:

> "However, we find no requirement either in the Federal Rules of Civil Procedure or in the Rules of the District Court of New Jersey that facts alleged in motions and not otherwise appearing of record should be sworn to or contained in an affidavit. The general tenor of the Rules, as they pertain to this question, indicates, rather, that the use of affidavits under such circumstances is discretionary with the parties or the court. Certainly, since a fact can be alleged in a motion, without verification, there would be little logic, in the absence of a specific rule to the contrary, to require the exhibits accompanying that motion to be under oath. The waiver was therefore properly before the court in this case."

Civil Procedure Rule 56 (b) clearly provides that a defendant may file a motion for summary judgment "at any time . . . with . . . supporting affidavits. . . ."

Civil Procedure Rule 56 (c) provides that "the judgment sought *shall* be rendered forthwith if the pleadings . . . together with the affidavits . . . show that . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Italics ours.)

Civil Procedure Rule 56 (e) relates to the form of affidavits and further testimony in support of a motion for summary judgment for the defendant.

Moore's Federal Practice Under the New Federal Rules, Vol. 3, (1938) states at page 3181:

> "A defending party may move for summary judgment at any time after a pleading stating a claim against him is served upon him. He is not required to serve his responsive pleading first. There is no necessity for a time limitation upon the making of a motion by a defending party, as his motion is directed at the claim and his defenses will appear in his supporting affidavit or other evidence. A typical instance where a defendant may move for summary judgment before serving his answer is when he admits the facts stated in the complaint but asserts the statute of limitations as a defense. Similarily, a defending party may make the motion before answer in any case where his defense involves only a question of law. And he may also make the motion before answer where he can show that the complaint is without merit or that he has a defense which will clearly defeat the claim asserted against him."

On page 3185 the authors, citing many cases, state:

> "Where there is no genuine issue of fact, the court is required by Rule 56 (c) to render summary judgment in favor of the moving party if he is entitled thereto as a matter of law. The existence of an important, difficult, or complicated question of law, where there is no issue as to the facts, is not a bar to a summary judgment. Rule 56 (c) clearly contemplates and requires that the court render summary judgment in such a situation."

On page 87 of the supplement to Volume 3, the authors cite many cases in point and state:

> "Similarly, where it appears from the affidavits, pleadings or depositions that there are no issues of fact, and the issues of law resolve themselves in favor of the defendant, a summary judgment may be entered on the defendant's motion."

The summary judgment procedure outlined in Rule 56 is a procedural device for promptly disposing of actions in which there is no genuine issue as to any material fact. The purpose is to eliminate a trial in such cases, since a trial is unnecessary and results in delay and expense. To attain this end, the rule permits a party to pierce the allegations of fact in the complaint and to obtain relief by summary judgment when the facts set forth in detail in affidavits and exhibits and admissions show there are no genuine issues of fact to be tried. [*Moore's Federal Practice,* Vol. 3(1938) pages 3174-5.] Thus, the District Court examines evidence not to try an issue but to determine where there is a genuine issue of fact proper for trial.

Summary judgment procedure does not infringe the constitutional right of a party to a jury trial.

Fidelity and Deposit Co. v. *U. S.* (1902) 187 U. S. 315.

Ex Parte Peterson (1920) 253 U. S. 300.

General Investment Co. v. *Interborough Transit* (1923) 235 N. Y. 133, 139 N. E. 216.

Port of Palm Beach District v. *Goethals,* (CCA 5th, 1939) 104 F. 2d 706.

E.

No question is presented arising under the due process clause of the Fifth Amendment to the Federal Constitution.

The respondents claimed in the court below that Section 153 (m) of the Railway Labor Act which provides that awards of the Board are final and binding upon both parties to the dispute, except insofar as they shall contain a money award, violates the due process law of

the Fifth Amendment to the Constitution. The respondents point out that if they obtain an award of the Board and the carrier refuses to make payment, the employees may file a suit for enforcement in the District Court. In that proceeding, the carrier may present evidence regarding any defense and in effect obtain judicial review of the decision of the Board on the merits of the case.

No corresponding right is given by the Railway Labor Act to the carrier to file a suit in the District Court when the award of the Board is in favor of the carrier. Nor have the respondents the right to judicial review when the Board's award is in favor of the carrier. Neither can the carrier obtain judicial review or court determination if the award of the Board is in favor of the employees and the employees do not seek enforcement in a suit filed in the District Court. *Washington Terminal Railway* v. *Boswell, et al.*, 124 F. 2d 235.

The petitioner contends that the negotiated compromise agreement of October 31, 1938 is an effective agreement and extinguished the claims asserted by the respondents in this case. For that reason, the District Court had no power to exercise its jurisdiction and this Court is not called upon to consider the constitutional question. The complaint filed by the respondents in the District Court failed to state a claim upon which relief can be granted and, therefore, the District Court correctly entered summary judgment for the petitioner. The constitutional question is moot.

Furthermore, the respondents in the first instance were not required to present their claims before the Adjustment Board. They could have directed their designated representatives to file a complaint in court and, thereby, obtain judicial determination of their claims. *Moore* v. *Illinois Central Railroad*, 312 U. S. 630. The failure of

the respondents to elect to obtain court adjudication in the first instance presents no constitutional question in this case.

CONCLUSION.

The award of the Board entered November 6, 1940 is final and binding upon the respondents, the petitioner and the courts in accordance with the provisions of the Railway Labor Act. The District Court had no power to exercise its jurisdiction. The complaint filed by the respondents did not state a claim upon which relief could be granted. Summary judgment was correctly entered by the District Court for the petitioner. Furthermore, apart from any provision in the Railway Labor Act, the collective bargaining agreement of October 31, 1938 extinguished all claims of the respondents for the alleged violation of Article 6 of the labor agreement. This Court should effectuate the intention of the parties at the time the agreement was executed. This presents no facts for jury determination. The judgment of the District Court should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
a Corporation,
Petitioner,

vs.

G. W. BURLEY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Reply Brief for Petitioner.

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SUMMARY OF ARGUMENT.

The Railway Labor Act imposes upon the parties a new terminology and new concepts. It compels the performance of new duties. It creates rights and privileges for employees and their designated representatives. It blocks out the nomenclature of the common law.

The authority of designated representatives to act is not specifically delegated by respondents. That authority springs from the Railway Labor Act. In like manner, that authority cannot be limited by lack of specific directions from respondents or by rules and by-laws of the Brotherhood, to which the respondents belong.

Designated representatives of the employees have power to change labor agreements. The Act so provides. Designated representatives also have power by the Act "to settle all disputes" and "with all expedition". Designated representatives have power by the Act, also, to compromise grievances, as was done in the case at bar in the execution of the compromise agreement of October 31, 1938.

Collective bargaining compromise agreements are not required to meet the technical requirements of consideration necessary for contracts of common law. The only requisite is that such agreements express the intention of the parties. This was done by the compromise agreement of October 31, 1938. The Adjustment Board so found in its award.

There is no dispute in the case at bar that the parties who executed this agreement were the designated representatives nor is there any dispute that the designated representative who filed the claim before the Adjustment Board was the proper representative to file such a claim. The Railway Labor Act gave this representative power to "refer" the claim to the Board, if he so elected. The fact that the claims may affect the "personal" or "individual" rights of the respondents does not destroy the final and binding effect of the award of the Board.

The final and binding provision in the Act, paragraph (m), should be construed to read that non-money awards of the Board shall be final and binding upon both parties to the dispute except insofar as the Act otherwise provides and except insofar as the constitution prohibits. The

respondents are forced to take the position that if there is an award of the Board against the employees or their designated representative, the employees can "disregard" the award because "it is of no effect whatsoever." This construction opposes the clear expression by Congress that awards shall be final and binding. The Senate and House reports at the time of the adoption of the 1934 amendments refer not only to a "compulsory" system of "adjudication" but also to the requirement that the Board shall "hear and decide" the disputes.

Paragraph (m) does not deny respondents due process of law required by the Fifth Amendment. Respondents and the designated representatives have the right to file a suit at law for damages and there obtain due process. If the designated representative elects to file a claim before the Board, the respondents are bound thereby and cannot (after the award of the Board issues against them) claim that the election of their designated representative deprives them of due process.

The argument that the respondent would have "a right of review" by courts if the award of the Board was in favor of the employees ignores the provision in paragraph (p) that enforcement proceedings in the District Court by petition are permissive only. The employees *may* file the petition but are not required by paragraph (p) to file it. The Fifth Amendment is a limitation upon the powers of the Federal Government. It is not directed against the election made by a designated representative not to have court adjudication of claims of the respondents. Therefore, the lack of due process argument does not apply.

ARGUMENT.

A.

The award of the Adjustment Board of September 6, 1940, denied the claim of the Brotherhood for additional pay at time and one-half from August 27, 1934 until November 14, 1938. That award is final and binding upon the respondents.

Throughout the brief for respondents there occur frequently the terms "release", "*res judicata*", Brotherhood as "agents" of the respondents, Brotherhood officials acting within scope of "authority," "valid consideration," "no consideration" and "meeting of the minds". This nomenclature of the common law is blocked out by the Railway Labor Act. The Act imposes on the parties a new terminology and new concepts. It compels the performance of new duties. It creates new rights and privileges for employees and their designated representatives.

The authority of the designated representatives to act is not specifically delegated by respondents. That authority springs from the Railway Labor Act. In like manner, that authority cannot be limited by lack of specific directions from respondents or by rules and by-laws of the Brotherhood, to which the respondents belong.

To permit such a limitation would destroy the powers granted to the designated representatives by Congress. The rules and by-laws of the Brotherhood can no more limit the compulsory requirements of the Act (Petitioner's brief, p. 24) than could by-laws or resolutions of the Board of Directors of the petitioner limit them. The mandatory provisions of the Act are supreme.

Respondents argue (brief, p. 14):

> "We submit that no rights of the members can be alienated without the member's consent, as the 'Board' and the lower Court did in the instant case."

Again (brief, p. 16) respondents argue:

> "Certainly, the right to damages is as valuable as a seniority right, and we believe the court should not fail to follow these decisions in holding that a union, nor its officials, cannot waive or destroy it."

The Act itself (45 USCA 152, Seventh) provides for changes in rates of pay, rules or working conditions as follows:

> "Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreement or in section 156 of this title."

Another provision of the Act (45 USCA 156 provides:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

When changes in the labor agreement are made in accordance with these provisions, personal rights of members of the union may be "alienated" or destroyed without their "consent". As stated in *System Federation* v. *Louisiana and A. Railway Co.*, 32 F. Supp. 89, 90 (affirmed 119 F. 2d 509):

> "This was collective bargaining and the various plaintiffs herein were bound. It follows from the plain reading that any and all claims for *damages* for a violation of seniority rights are foregone and cancelled, certainly as far back as February 9, 1931." (Italics ours.)

Designated representatives of the employees have power to change the labor agreement. The Act so provides. Designated representatives also have power to compromise grievances. That power to make the compromise agreement of October 31, 1938, effective is derived from the provisions of the Act authorizing representatives "to settle all disputes" and "with all expedition."

Collective bargaining compromise agreements do not need to meet the technical requirements of consideration required by contracts of common law, as respondents argue (brief, p. 17-19). The only requisite is that the agreements express the intention of the parties to settle grievances. That was done in the compromise agreement of October 31, 1938. The Adjustment Board so found in its award.

Respondents argue (brief, p. 23) that the Board has no jurisdiction of their "individual" claims because there was no "authority" in C. H. Williams, Chairman of the Grievance Committee, to present the same to the Board. There is no dispute that C. H. Williams, as Chairman of the General Grievance Committee, was the designated representative of the respondents. He alone is the official of the Brotherhood authorized to file claims before the Adjustment Board. The first claim filed before the Board

relating to the alleged violation of Article 6 was filed by C. H. Williams as "General Chairman—BRT—EJ&E System" (R. 14). It is admitted by all respondents (brief, p. 25) that this claim was properly filed. The second claim for the alleged violation of Article 6 was filed by C. H. Williams as the designated representative of the respondents and as "General Chairman, B. of R. T., E.J.&E. System" (R. 72). This claim was filed in accordance with the provisions of Section 153 (i) of the Act (45 USCA) which in part provides that ". . . failing to reach adjustment . . ., the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with the full statement of the facts and all supporting data bearing upon the disputes."

Respondents argue (brief, p. 25) that designated representatives do not have authority under the Act or under the constitution and by-laws of the Brotherhood to file before the Board "claims for pay or claims for breach of contract." Respondents admit, however, (brief, p. 24) that the designated representatives do have authority to file before the Board claims relating to "rates of pay, rules or working conditions."

The claim filed before the Board by the designated representative in the case at bar related to rates of pay, rules and working condtions. The labor agreement or "schedule" signed by the Brotherhood and the petitioner in this case (Exhibit "H") is entitled "Rules and Rates of Pay for Yardmen." Respondents in their complaint predicated liability of the petitioner in accordance with Article 6 of that agreement.

The dispute "referred" to the Board in the case at bar was a dispute concerning "rates of pay, rules, and working conditions." The Act gave the designated representative the power to "refer" this claim before the Board, if he so elected. The fact that such a claim may

affect the "personal" or "individual" rights of the respondents is immaterial. Congress intended that disputes concerning these rights may be referred by the designated representative to the Board for adjudication. If specific authority of the designated representative is necessary from each employee relating to matters affecting the "personal" or "individual" rights of each employee, designated representatives will be stymied in carrying out their statutory duties. Furthermore, if such specific authority is necessary, one of the main objects of the Act "to settle all disputes" and "with all expedition" will be frustrated, contrary to the policy of Congress.

Respondents in their brief (pp. 24, 26) refer to *Griffin* v. *Chicago Union Station*, 13 F. Supp. 722, and *Nord* v. *Griffin*, 86 F. 2d 481, certiorari denied, 300 U. S. 673, for the purpose of showing that if the designated representatives do not have specific authority from the particular employee, the award of the Board is void and, also, that if the particular employee affected does not have actual notice of the hearing before the Board, that employee is denied due process of law guaranteed by the Fifth Amendment.

It is admitted that cases similar to *Griffin* v. *Chicago Union Station* and *Nord* v. *Griffin* are exceptions to paragraph (m) that non-money awards of the Board shall be final and binding. In other words, paragraph (m) should be construed to read that non-money awards of the Board shall be final and binding on both parties to the dispute, except insofar as the Act otherwise provides and except insofar as the constitution prohibits.

It is important to note also that in these cases (*Griffin* v. *Chicago Union Station and Nord* v. *Griffin*) the designated representatives before the Board took a position which was *adverse* to some employees. That relation does not apply to the facts in the case at bar. The designated

representative before the Board was a *proponent* of the claims for the respondents, the same which are asserted in the complaint now before this Court.

There is no requirement in the Act that notice shall be given to each particular employee who may be affected by the award when a claim is filed in his behalf by the designated representative. The designated representative had power by the Act itself to "refer" the claims of the respondents to the Adjustment Board for adjudication. The designated representatives of the respondents also had the right before their claims were referred to the Board for adjudication to file suit at law for damages. *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630.

Nevertheless, once the case is referred to the Board by the designated representative and the Board has decided it and denied the claim of respondents, respondents later cannot assert the same claim in court. The policy of the Act that non-money awards of the Board are final and binding deprives courts of power, directly or indirectly, to pass upon the same claims adjudicated by the Board, except in the special cases for which provision is made in paragraph (p) of the Act, which provides the exclusive remedy for court review. *Cf. Baltimore and Ohio R. Co., et al.* v. *Brady*, 288 U. S. 448, 457; *I. C. C.* v. *United States*, 289 U. S. 385, 394.

When the designated representative files a claim before the Board, the action on the labor agreement at law which therefore existed is merged in the award. If this result does not follow, every time the claim filed before the Board by the designated representative is denied, the temptation will be great for each employee involved to assert that the designated representative did not have specific authority to file the claim and that, therefore, the employee should have another day in court by filing a suit at law for damages. This reasoning would destroy the policy of Congress to make non-money awards final and binding, ex-

cept as provided in paragraph (p), and would result in the intended adjudication of the Board being a mere ritual with no legal significance.

B.

No question is presented arising under the due process clause of the Fifth Amendment to the Federal Constitution.

On page 27 of the brief for the respondents there is presented the argument that

> "Certainly, the award asked for by Williams was a money award, and though it was not awarded, it 'contained' a money award."

This construction does violence to the language of paragraph (m). Paragraph (m) cannot reasonably be construed to mean that the awards of the Board shall be final and binding upon both parties to the dispute except insofar as the claims filed by the designated representative sought to obtain a money award.

Apparently, counsel for the respondents themselves are not impressed with the argument because on page 31 they argue

> "If there is an award against the employee by the Adjustment Board, he can, for all practical purposes, disregard the same because it is of no effect whatsoever as far as he is concerned."

This conclusion is necessary for the respondents to maintain this suit. It disregards the provisions of the Act clearly expressed by Congress. There was no intention at the time of the passage of the 1934 amendments to the Railway Labor Act that awards by the Board denying claims of the employees might be "disregarded" and be considered of "no effect whatsoever." The policy declared by Congress was quite the contrary.

The Senate report on the 1934 amendments (Report No. 1065, 73rd Congress, 2nd Sess., Page 1 *et seq.*) in part stated:

> "Congress passed the Railway Labor Act with the joint approval of both the representatives of the railroads and the railway labor organizations. They believed it would enable them to settle their differences without the element of compulsion. . . .
>
> "One of the principal weaknesses of the law in practice has been that regional boards have not been set up in some sections of the country for settlement of the disputes in some of the crafts. Both representatives of the carriers and of the employees agree that the setting up of boards for the settlement of disputes should be made compulsory, when necessary. Representatives of the carriers proposed that the setting up of regional boards be made compulsory; representatives of most of the employees insisted that the setting up of the National Board of Adjustment with four divisions be made compulsory. . . .
>
> "The ideal situation would be to have disputes and grievances settled by the men and management on the several properties without any recourse to adjudication by an outside tribunal. Some of those advocating this legislation believe the fact that there is a compulsory board to which grievances may be taken will greatly increase the settlement of disputes by voluntary adjustment boards between the employees and the railroads."

Furtherfore, the report on the 1934 amendments by the House of Representatives (Report No. 1944, 73rd Congress, 2nd Sess.) in part stated:

> "This bill, therefore, provides for the establishment of a National Board of Adjustment to which these disputes may be submitted if they shall not have been adjusted in conference between the parties. . . .
>
> "Division 1 is given authority to hear and decide the disputes involving train, engine, and yard service employees, such as engineers, firemen, conductors, trainmen and switchmen. . . .

> "The committee is confident that this bill strengthens the Railway Labor Act where it is necessary to do so, and feels sure that if the Act is amended as proposed in this bill it will provide effective and adequate machinery to adjust controversies between the carrier, managements and employees. It will assure employees the right to bargain collectively and will contribute immeasurably to the establishment and maintenance of industrial peace."

The respondents argue (brief, p. 29) that paragraph (m) violates the due process clause of the Fifth Amendment because

> "when an award is entered against the employer and he refuses to comply therewith, it is necessary for the employee to file a suit at law, which is a trial *de novo*."

The respondents concluded (p. 29) that

> "This situation affords the employer a right of review of the decision of the 'Board,' and refuses the same right of review to the employee."

This argument ignores the well settled policies of Brotherhoods not to seek court review when the award of the Board is in favor of the employee. In practice, the Brotherhoods rely upon their economic force. The argument that such an award is "absolutely meaningless" (respondents' brief, p. 32) is unrealistic. Generally, Brotherhoods do not find it "necessary" to file a suit at law to enforce awards of the Board in favor of employees. Consequently, carriers seldom are given a "right of review".

Furthermore, "a right of review" is not granted to the carrier by paragraph (p) of the Act when the award is in favor of the employee. Paragraph (p) is permissive only. It provides that if the carrier does not comply with the order of the Board, the petitioner or any person for

whose benefit such order was made *may* file in the District Court a petition setting forth the causes for which he claims relief.

Finally, if the designated representative elects to file a claim before the Board rather than before a court (*Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630), neither the designated representative nor the employees may complain about the want of due process if the award of the Board is adverse. Due process of law by court adjudication is always available to designated representatives or employees before they elect to file a claim before the Adjustment Board. The same considerations apply to a carrier before any claim is filed before the Board by designated representatives or by the employees. In these circumstances, the lack of due process argument does not apply.

The Fifth Amendment is a limitation upon the powers of the Federal Government. It is not directed against an election by designated representatives to avoid court adjudication. (*Corrigan, et al.* v. *Buckley*, 271 U. S. 223; *Teague* v. *Brotherhood of Locomotive Firemen*, 127 F. 2d 53.)

Court review is not a necessary supplement to due process of law in the Fourteenth Amendment. (*Reetz* v. *Michigan*, 188 U. S. 505; *Plymouth Coal Company* v. *Pennsylvania*, 232 U. S. 531, 547; *L. & N. R. Co.* v. *Greene*, 224 U. S. 522; *Hardware Dealers Mutual Fire Insurance Company* v. *Glidden Co.*, 284 U. S. 151.) Neither is court review necessary to due process of law in the Fifth Amendment. (*United States* v. *Heinze*, 218 U. S. 532; *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533; *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation*, 301 U. S. 1, 46; *Virginian Railway Co.* v. *System Federation, No. 40*, 300 U. S. 515, 558.)

CONCLUSION.

When the petitioner made the compromise agreement of October 31, 1938, with the designated representatives of the respondents, the petitioner was not required to look behind the authority conferred by the Railway Labor Act upon the designated representatives to make the settlement. Specific authority of each respondent or of the local lodge to which the respondents may belong is not required by the Railway Labor Act. The respondents are bound by the collective bargaining compromise agreement of October 31, 1938. This Court should so decide and reverse the judgment of the Circuit Court of Appeals.

The award of the Adjustment Board finding that the compromise agreement disposed of all claims of the respondents against the petitioner should be held final and binding upon the respondents and a bar to this proceeding.

It "seems plain that the command of the statute to negotiate for the settlement of labor disputes, given in the appropriate exercise of the commerce power, cannot be said to be so arbitrary or unreasonable as to infringe due process." (*Virginian Railway Co.* v. *System Federation, No. 40*, 300 U. S. 515, 559.)

If the award against the employee may be "disregarded" and considered "of no effect whatsoever," as respondents contend in their brief (p. 31), the statutory scheme of settlement of railroad disputes devised by Congress will have no legal consequences. The result intended by Congress should be effectuated by this Court. That result can be obtained only by reversing the judgment of the Circuit Court of Appeals and affirming judgment for your petitioner entered by the District Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

G. W. BURLEY, ET AL.,

Respondents.

REPLY TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND SUPPORTING BRIEF.

JOHN H. GATELY,
Counsel for Respondents.

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Of Counsel.

THE CONTRACT-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

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No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

G. W. BURLEY, ET AL.,

Respondents.

RESPONDENTS' STATEMENT MAKING AGAINST THE JURISDICTION.

Respondents respectfully call the court's attention to the following grounds making against the jurisdiction of the court in this matter:

First, it is manifest that the petitioner has filed the petition only for purposes of delay.

The questions upon which it is claimed that the jurisdiction of this court depends are so unsubstantial and unrelated with the issues decided by the United States Circuit Court of Appeals as to need no further arguments.

Secondly, petitioner's assignment of errors fails to set out and show a compliance with Rule 38 Paragraph 2 of

the Rules of the Supreme Court. The petitioner fails to particularly disclose the basis upon which it contends that this court has jurisdiction. It cites no cases sustaining jurisdiction on the point involved. The petitioner fails to cite any cases decided by any other United States Circuit Court of Appeals or any other Circuit in conflict with the decision herein sought to be reviewed. *U. S.* v. *Rimer*, 220 U. S. 547.

All of the cases involving the question of procedure before the United States Supreme Court hold that petitioners for certiorari must with particularity show a compliance with the rules of the court in setting forth the grounds on which they claim the court has jurisdiction.

We respectfully suggest that the decision of the United States Circuit Court of Appeals of the Seventh Circuit was founded on a matter of judicial procedure. (R. 112.)

> "This case presents a question of fact as to whether a compromise of the claims relied upon in the plaintiff's complaint had been compromised by the plaintiff's agents. The procedure for summary judgment was intended to expedite the settlement of litigation where it affirmatively appears upon the record that in the last analysis there is only a question of law as to whether the party should have judgment in accordance with the motion for summary judgment. If there was any question of fact presented on the record in the proceedings for summary judgment, the motion could not be sustained. Because we think this record affirmatively shows there was an issue of fact, the motion for summary judgment should not have been granted."
>
> Rule 56 of the Rules of Civil Procedure, 28 U. S. C. A.

We respectfully submit that Rule 56 should dispose of the present petition.

The record in the instant case clearly shows several issues of fact material to the controversy (R. 42) and in the

case of *Merchants Indemnity Corp. of N. Y.* v. *Peterson*, 113 Fed. (2nd) 4, 6, the record there stated that under Rule 56 a summary judgment may not be entered if there be an issue presented as to the existence of any material fact.

We submit that under Rule 56 and the decided cases, it is not contemplated that a trial should be had by affidavit when there are undecided issues of fact, without a right of cross-examination in open court.

Campana Corp. v. *Harrison*, 135 Fed. (2nd) 334, 336.

Merchants Indemnity Corp. of N. Y. v. *Peterson*, 113 Fed. (2nd) 4, 6.

BRIEF IN SUPPORT OF REPLY.

A.

Summary and Short Statement of the Matter Involved.

Respondents respectfully call this court's attention to the fact that at the top of page two of the petitioner's brief, it alleges that it is aggrieved by the decision of the United States Circuit Court of Appeals in denying a petition for rehearing, and that Judge Kerner dissented from this ruling. The truth of the matter is that Judge Kerner did not dissent. Judge Kerner did not concur. (R. 129.)

Petitioner fails in its summary to set forth all of the case upon which the opinion was rendered; namely; that a motion to strike the motion to dismiss and for summary judgment, was filed by the respondents (R. 41), and that a reply and counter-affidavit (R. 43-61) were filed by the respondents controverting the facts alleged in petitioner's affidavit in support of its motion.

B.

Statement of the Basis Upon Which It Is Contended That This Court Does Not Have Jurisdiction to Review the Judgment of the United States Circuit Court of Appeals for the Seventh Circuit.

The petitioner herein states that the jurisdiction of this court to grant the Writ of Certiorari is invoked under Section 240 (a) of Judicial Code (28 U. S. C. A. 347). The petitioner, however, fails to show specifically where, and under what part, of the aforesaid Section it seeks to invoke this Court's jurisdiction.

It is a well established principle of law that the jurisdiction of this tribunal to review decisions of the various Circuit Courts of Appeal should be sparingly exercised, and then only in cases of peculiar gravity and general importance; in cases affecting relations with foreign governments; or to secure uniformity of decisions among the various Circuit Courts of Appeal.

Lau Ow Bev, Petitioner, 141 U. S. 583, 587.
Fields v. *U. S.,* 205 U. S. 292, 296.
Hamilton-Brown Shoe Co. v. *Wolf,* 240 U. S. 251.
Houston Oil Co. v. *Goodrich,* 245 U. S. 440.

The petitioner herein fails with any particularity to show that the decision herein sought to be certified comes under any of the aforesaid reasons. It alleges that the decision is in conflict with the decisions of this Court and other Circuit Courts of Appeal, but fails to point out wherein it does so. We shall point out in later phases of our brief that the cases cited by the petitioner, supposedly in conflict with the decision rendered by the Circuit Court of Appeals in the instant case, are not even remotely similar.

On page five of its brief, the petitioner states:

> "If the decision of the Circuit Court of Appeals in this case is not reversed, collective bargaining will be destroyed."

The decision sought to be revitewed herein does not involve the issue of collective bargaining. It does not involve disputes concerning rates of pay, rules or working conditions, but does involve a question of Federal Court procedure wherein the authority of an agent to represent principals concerning their personal rights is challenged, and we maintain that officials of a trade union are not the agents of members for the purpose of waiving any personal rights they may have, unless they have specific authority so to do.

Illinois Central v. *Moore,* 112 Fed. (2nd) 959 (Reversed by this court on other grounds) 61 S. Ct. 754.

Pearcy v. *Louisville N. Y. Ry. Co.,* 248 S. W. 1042, 1045.

Panhandle Ry. v. *Wilson,* 55 S. W. (2nd) 216, 219.

McCoy v. *St. Joseph Belt Ry.,* 77 S. W. (2nd) 175, 178.

Ahlquist v. *Alaska etc.,* 39 Fed. (2nd) 348.

Under the Railway Labor Act, 45 U. S. C. A. Paragraph 153, the employee has the right to bring his action in court, or he may utilize the administrative remedies therein set forth. In *Adams et al.,* v. *N. Y. Central & St. Louis Ry. Co.,* 121 Fed. (2nd) 808. On page 810, the court said:

> "In view of the Supreme Court's clarifying language as to the intended scope of the Railway Labor Act, * * * we can definitely state that the employees' action may be brought at their election, either in a court or settled by the administrative remedies prescribed by said Act."

Petitioner throughout its petition and all of the authorities that it has cited in support of its contention that collective bargaining is the gist of the action here involved, has cited cases on an entirely different and distinct section of the Railway Labor Act, being Section 155 thereof, dealing with the Mediation Board, set up under the Railway Labor Act, which was designed by Congress to mediate controversies arising between unions and between unions and the employer carrier, which provides for no interference nor interpretation by the courts. It is merely set up for the purpose of acting in a referee capacity.

The decision herein sought to be reviewed deals solely with a question of procedure for summary judgment, as issues of fact had been presented by the affidavits in support of defendant's motion, and controverted by plaintiff's reply and counter-affidavit wherein they denied the authority of the agent to handle their individual and personal claims before the Railway Adjustment Board.

On page four, petitioner states that the Railway Labor Act and the decisions of this court prohibit individual dealings with employees. This assertion does not correctly represent the law and is contradicted by the statute and the very cases cited by counsel, which he still insists upon alleging, although corrected in the Circuit Court of Appeals. Section 152 of the Railway Labor Act, the fourth paragraph, *inter alia*, reads as follows:

> "That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees, from conferring with management during working hours without loss of time * * *."

On page five, petitioner cites the case of *J. I. Case* v. *National Labor Relations Board*, 64 Sup. Ct. 576, in support of its contention that the Railway Labor Act prohibits individual dealings between employees and employer. We

could dismiss the case by remarking that it involves the National Labor Relations Act and not the Railway Labor Act, but we call the court's attention to a statement found in the case in order to point out the attempt by petitioner to mislead the court. On page 581 this court therein stated:

> "We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement or is not part of an unfair labor practice."

which we submit is diametrically opposed to petitioner's contention.

Petitioner also cites, *Order of Railroad Telegraphers* v. *Railway Express Agency*, 64 Sup. Ct. 582, supposedly supporting the same contention. In this case the Express Company attempted to vary the terms of an agreement negotiated through collective bargaining, by entering into individual contracts with its employees. The Court ruled that the agreement negotiated through collective bargaining was not superseded by individual contracts and that the latter were ineffective. The facts in the case are not even remotely analogous to the instant case.

On page six of its brief, the petitioner cites five cases as supposedly being in conflict with the decision rendered by the Circuit Court of Appeals in the instant cause. We shall not burden this Court by reviewing and analyzing all of the five cases, but in order to show petitioner's misconception and misconstruction of the law applicable to the instant cause, we shall briefly analyze two of the five cases cited by petitioner.

In *Division 525, Order of Railway Conductors* v. *Gorman, et al.*, 133 Fed. (2nd) 272 (C. C. A. 8th, 1943), the president of the Order had the power to "confirm, reverse or annul, and remand for reconsideration" any contract entered into by the union on behalf of the employees. The president of the Order cancelled a contract and the employees ques-

tioned the validity of the cancellation of the first contract. The Court in sustaining the cancellation of the contract emphasized the fact that the decision of the president of the Order was final. On page 278 the Court said:

> "While we think it is not within the province of the court to determine the regularity of the procedure to enter into the agreements involved, yet a study of the record convinces that the procedure was that prescribed by the rules of the Order and, hence, the decision of the president was valid and binding on the plaintiffs."

In *Virginian Railway Company* v. *System Federation, No. 140,* 300 U. S. 515. On pages 548-549, the court made the following statement:

> "We think, as the government concedes in its brief, that the injunction against petitioners entering into contract concerning rules, rates of pay and working conditions, except with respondents, is designed only to prevent collective bargaining with anyone purporting to represent employees other than respondent, who has been ascertained to be their true representative. When read in its context, it must be taken to prohibit the negotiation of labor contracts, generally applicable to employees in the mechanical department, with any representative other than respondent, *but not as precluding such individual contracts as petitioner may elect to make directly with individual employees.*" (Italics ours.)

In the second paragraph on page six of its brief, petitioner makes the allegation that the present case is not unlike a jurisdictional controversy between unions. It cites three cases to the effect that jurisdictional controversies between unions are not justiciable controversies within the meaning of the Railway Labor Act. All of the cases cited by the petitioner to support this point involved hearings before the National Mediation Board and are not in point.

On page four petitioner makes the allegation that this

case necessarily involves a construction of the Railway Labor Act. We have heretofore attempted to point out to this court what the case involves and respectfully suggest that by this statement petitioner is "Putting the cart before the horse." If it should be found that the purported agent of the plaintiff respondents herein, did not have authority to submit the individual and personal claims of the employees to the Adjustment Board, then any questions concerning the Railway Labor Act, or a decision of the Adjustment Board could not arise, because the proceeding before the Adjustment Board would be void, because the Board lacked jurisdiction. If under the controverted question of authority of the agent, it is decided, after a due and proper trial in court, that the agent did represent these respondents, then the question of the finality of the decision of the Adjustment Board could be raised, as also the question of the constitutionality of the Railway Labor Act, the Act failing to give the employee a right of review of the Board's decision when the Act in effect gives a right of review to the employer, thereby violating the due process provision of the United States Constitution.

But, we respectfully submit, those questions are not, and cannot be before this Court, until the question of agency is determined; and that, by a properly constituted and impaneled jury.

In summarizing, we respectfully reiterate that the only principle of law decided by the United States Circuit Court of Appeals in the instant case, is a matter of procedure, as to whether or not a District Court should properly, upon a hearing by affidavits, enter an order on a motion for summary judgment, when there is a dispute as to a material fact.

There is no disagreement with this decision and any

other decision of the various circuits of the Circuit Courts of Appeal. Petitioner has cited none in point.

C.

The Questions Presented.

The questions that petitioner set forth in paragraph C of its petition entirely ignore the actual issue presented by the decision of the United States Circuit Court of Appeals in the instant case, for none of them was passed upon, nor decided by, the court in its decision herein sought to be reviewed. Petitioner has avoided the real issue in controversy.

D.

Reasons Relied Upon for Not Allowing the Writ.

As heretofore shown, the decision of the Circuit Court of Appeals does not conflict with any decisions of this court nor with decisions of other Circuit Courts of Appeal.

We feel certain that this court will not wish to be burdened with a question of procedure that has been stated by rules and followed uniformly by the different Circuit Courts of Appeal.

> Rule 56 of the Rules of Civil Procedure, 28 U. S. C. A.
>
> *Campana Corp.* v. *Harrison,* 135 Fed. (2nd) 334, 336.
>
> *Merchants Indemnity Corp. of N. Y.* v. *Peterson,* 113 Fed. (2nd) 4, 6.

This court is too familiar with the long established doctrine that where a court or administrative tribunal does not have jurisdiction over the parties any order entered by it is void. We will, therefore, not burden the Court with

any further discussion or citation on the matter, but wish to assert the same in answer to petitioner's statement contained under Heading "D".

Conclusion.

In our brief, we have pointed out that the only question involved in the instant cause is one of procedure; namely, whether or not the district court was in error in entering a summary judgment.

We have shown that the instant cause does not involve the question of collective bargaining, nor the construction of the Railway Labor Act. The cases cited by petitioner in its brief involve controversies before the National Mediation Board and, consequently, are not in point.

The petitioner has failed to show that the case is one of peculiar gravity or that there is any conflict between the decision in the instant case and the decisions of the other Circuit Courts of Appeal. The foregoing reasons impel the conclusion that in this case, certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

G. W. BURLEY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

G. W. BURLEY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT.

I.

Report of Opinion.

The opinion of the Circuit Court of Appeals (R. 110-113) is reported in 140 F. 2d 488.

STATEMENT OF THE CASE.

Petitioner, in its Statement of the Case, correctly sets forth the pleadings but fails to accurately inform the Court of the facts of the case. We, therefore, submit the following summary as our Statement of the Case.

This is an action brought by the Respondents to recover damages for a breach of contract by the Petitioner in refusing to permit the Respondents to start work at the designated starting times set out in the "schedule", or agreement, entered into with the Respondents by the Petitioner. The Petitioner filed a motion to dismiss and for summary judgment supported by affidavits. Respondents filed counter-affidavits which controverted several of the pertinent facts set out in the Petitioner's affidavit. Petitioner herein, in its motion to dismiss, set up a plea of release and a plea of *res judicata*. The plea of release was predicated upon a letter signed by the General Chairman and General Secretary of the Brotherhood of Railroad Trainmen, of which the Respondents were members. Respondents contend that the letter was not a release of the personal claims they had against the Petitioner, because the letter was not signed by all of the necessary officials of the Brotherhood of Railroad Trainmen, contrary to the By-laws thereof, of which the Petitioner had knowledge. The further objection to giving effect to the letter was that it was signed without the authority or knowledge of the Respondents. Further, that it could not act as a valid release because there was no consideration therefor, and there was no meeting of the minds of the contracting parties.

The alleged plea of *res judicata* set up a decision of the National Railroad Adjustment Board, which decision was predicated upon claims that had been filed by one of the officials of the Brotherhood, without the authority or knowledge of the Respondents, for the individual claims the Respondents had by reason of the breach of their contract with the Petitioner. This decision was adverse to the Respondents. The *"Board"* found that the letter, aforesaid, which had been pleaded by the Petitioner before the *"Board"*, was a release of liability.

Respondents filed a motion to strike the motion of the Petitioner and set out, therein, that there were may issues of fact only triable by a jury.

Respondents contend that the affidavits filed raised opposing questions of fact pertaining to the case and that, therefore, the case should have been tried by a jury rather than determined on a motion for summary judgment.

The Lower Court sustained the motion and entered an order dismissing the complaint.

An appeal was taken to the U. S. Circuit Court of Appeals, Seventh District, and therein certain errors were set forth; being the Court's considering the letter to be a release; that the decision of the "Board" was final; in failing to hold that Section 153-(m) and (p) of the Railway Labor Act was unconstitutional, and in granting the motion for summary judgment.

Prior to July 24, 1934, the Respondents herein had been employed by the Standard Oil Company, Whiting, Indiana, to perform private switching in their yard at Whiting. On July 24, 1934, they entered into an agreement with the Petitioner, through the officials of the Brotherhood of Railroad Trainmen, (which we will subsequently refer to as the B. of R. T.) which agreement or "schedule", as it is called, had been received as Ex. H, of the Petitioner in the United States Circuit Court of Appeals in accordance with its order of July 26, 1941. Article 6 of said "schedule" concerns the starting times when the Respondents herein were to begin work for the various yard crews, the Whiting yard included. Contrary to said agreement, despite the repeated protests of the Respondents, the Petitioner refused to make available switch engines for the Respondents at the times designated in Article 6 of the "schedule". (Ex. H aforesaid.)

Respondents filed many complaints objecting to the refusal to abide by Article 6, with the local officials of the Petitioner and through the local officials of the B. of R. T. with the Petitioner, and time slips were made out (R. 47, par. 10, p. 48, par 13). Subsequently, at a meeting of the B. of R. T., authority was given to the B. of R. T. officials by Respondents, and others working at the Whiting yard, to file a complaint with the National Railroad Adjustment Board to require the Petitioner to comply with Article 6. Thereafter, on November 23, 1936, the same was filed (Doc. 3537, R. p. 14, 15).

The complaint filed with the National Railroad Adjustment Board, hereinafter referred to as the "Board", as aforesaid, was in accordance with the Constitution and By-Laws of the B. of R. T. (Par. 5, 6, and 7, Ex. G, a copy of which had been filed with the United States Circuit Court of Appeals, in accordance with the order entered July 26, 1941), which Exhibit had been offered by the Petitioner herein.

Subsequently, on October 31, 1938, without any notice or authority, and without any consideration to the Respondents, the General Chairman and the Secretary of the B. of R. T. consented, in writing, on a letter executed by the Petitioner, (R. 16-23) to the compromising of 61 separate cases then pending before the National Railroad Adjustment Board. Eleven of these cases involved grievances against the Petitioner herein, including the grievance, being case No. 5 (R. 17). Fifty of the matters contained in said letter involved specific claims for money for eighty-five or more individuals, four of which involved personal injury claims (cases nos. 46, 47, 48, 54, R. p. 22). In and by said letter the Petitioner herein agreed in the future to abide by Article 6.

That under rule No. 3 of the Constitution, and general rules of the B. of R. T. (Ex. A, R. 50), the whole general grievance committee could not revise or change a general wage "schedule" or agreement concerning rates of pay, nor working conditions, unless authorized to do so by a majority vote of the lodges, or by a majority vote of the membership in the system. The general grievance committee consists of the General Chairman, the General Secretary and the Local Chairman (Constitution and General Rules of the B. of R. T., Ex. G of the Petitioner heretofore filed, p. 166, par. 7 lines 10-23). These three men did not sign the letter (R. 23). It is signed by C. H. Williams, the General Chairman, and S. F. Johnson, the Secretary.

On May 18, 1939, without any authority or knowledge of the Respondents (R. 44, par. 3-A), General Chairman Williams filed claims for money for the Respondents herein before the *"Board"*. Thereafter an award was made thereon denying the same (Ex. F, R. 26-39).

That while said alleged claims of Respondents herein were then pending, the Brotherhood of Firemen and Engineers filed a claim with said *"Board"*, involving the identical subject matter of the Respondents herein, and an award was made in the employee's favor by said *"Board"*. (R. 52, Ex. B).

Neither Chairman Williams nor Secretary Johnson had any authority from the Respondents herein to waive, or give any release for, any individual claims of the Respondents (R. 49, par. 19). They failed to notify the Respondents and other members of Lodge 281 of their "settlement of claims" (R. 49, par. 20), as required by the By-Laws of the B. of R. T. (R. page 51, rule 8½). Respondents contend that Williams, as General Chairman, being one of the signers of the letter of October 28, 1938, aforesaid, did not consider said letter a waiver of the individual claims

of Respondents, for he did not notify Respondents of any settlement in accordance with the rule aforesaid, and a short time after the execution of said letter, without the knowledege of the Respondents, filed the individual claims before the "Board". (R. 26).

SUMMARY OF ARGUMENT.

A summary judgment cannot be rendered where there are contested issues of fact. Respondents maintain that the following were contested issues of fact in the instant cause:

1. Were the officials who executed the purported release, being the letter of October 28, 1938 (R. 16) authorized and empowered to issue any release of the individual claims of the respondents herein.

2. Did said officials of the B. of R. T. act as agents of the Respondents herein in filing any individual claims with the National Railroad Adjustment Board.

3. Was there a meeting of the minds of the respective parties who signed the letter, as required by law of contracts, so that the letter of October 28, 1938, could be considered a valid contract. The position of the Respondents being that there was no meeting of the minds on any release of individual claims of Respondents herein, because shortly thereafter, Williams, one of the signers, filed claims for time with the Railroad Adjustment Board.

These questions of fact were controverted, and under the law must necessarily be submitted to a jury for decision. Therefore, the allowance of the motion for summary judgment was in error.

If Williams and Johnson, the officials of the B. of R. T., were not authorized under the By-laws of the B. of R. T., nor specifically, by these Respondents, to sign a release for their individual claims, and there is no presumption in law that they could so act as their agents, then the letter of October 28, 1938, (R. 16) could not, and should

not, be considered as a valid release of the individual claims of the Respondents herein.

The officials of a union do not have authority *ipso facto* to waive, nor release, the individual rights of the members of the Union.

The so called release pleaded by the Petitioner herein, being the letter of October 28, 1938, (R. 16) could not be considered a valid release of itself because of lack of authority in the signers to represent the Respondents herein. There was no consideration received by the Respondents to support a release. The letter itself by its terms does not purport to be a release of the individual claims of the Respondents, but rather refers to the claims for money on other claims therein set forth.

The award, pleaded by the Petitioner herein, of the National Railroad Adjustment Board, denying the individual claims of the Respondents herein to damages, by reason of the Petitioner's breach of Article 6, cannot be considered as *res judicata* of the Respondents' claims.

The "Board" lacked jurisdiction over these Respondents in the case as pleaded by the Petitioner herein. First, because the claims were filed by Williams without authority or knowledge of the Respondents herein (R. 48, par. 14, 15, 16). Second, because there was no notice of any hearing or the pendency of the hearing given to the Respondents herein. (R. 48, par. 17).

Section 153 (M) and (P) of the National Railway Labor Act must be held unconstitutional as controvening the Fifth Amendment to the Federal Constitution as being a violation of due process of law. The employer or carrier under the Act is given a right of review in the event the decision of the "Board" is against it. After an order is entered by the "Board", requiring the carrier to perform

any act, it may refuse to do so, and the remedy of the employee is the filing of a suit in the District Court based upon the award. The ensuing trial is a trial *de novo*. Thereby the carrier obtains a review of the award.

If the employee is unsuccessful before the "Board", its decision is against him, he has no redress.

We submit that such a procedure is unconstitutional.

ARGUMENT.

I.

Petitioner's motion to dismiss the complaint and for summary judgment was allowed in the lower court contrary to law.

Petitioner herein has adroitly evaded, in its points, the compelling fact decided by the United States Circuit Court of Appeals herein, namely, that in order for any court, or board, to render any binding decision, it must have jurisdiction of the parties. We maintain, in the instant case, that the "award" of the National Railroad Adjustment Board, pleaded by Petitioner herein as *res judicata*, is void for want of jurisdiction of the parties.

The Affidavits and Counter Affidavits (R. 11, 46, 61) filed in this cause in connection with the Motion for Summary Judgment and the Motion to Dismiss, presented controverted issues of fact. A Jury Trial had been requested at the filing of the suit. Therefore, the court was not empowered, nor authorized, to pass upon these facts on the hearing of a Motion for Summary Judgment, as the United States Circuit Court of Appeals finds, in its decision (R. 112). The main controverted facts were:

1. The question of authority of Williams, as Chairman, and Johnson, as Secretary, of the B. of R. T., as set out in the Counter Affidavit on the Motion to Dismiss (R. 45, Par. 11, 14, 15, 16, 19), to compromise any claims with the Petitioner, when they were only empowered to file a grievance to compel the Petitioner herein to abide by the terms of Article 6;

2. Whether or not Williams had authority to file any personal claims of the Respondents with the National Railroad Adjustment Board.

3. Whether or not there was a "meeting of the minds" between Williams and Johnson and the Petitioner in the letter of October 28, 1938 (R. 16), pleaded by the Petitioner as a release.

4. Whether a contract is supported by sufficient consideration is a question of fact and should be submitted to the jury.

We submit that all of the decisive cases on the point concur, in the enunciation of the law, that where there are contested issues of material facts, the court should not dispose of a case on a Motion for Summary Judgment, and that the only time a Motion for a Summary Judgment may be allowed is when the same is sustained by undisputed facts.

Consolidated Indemnity Company v. *Alliance Company*, 68 Fed. (2d) 21.

Klink v. *Chicago R. I. and P. Ry. Company*, 219 Fed. 457.

National Surety v. *Ellison*, 88 Fed. (2d) 399.

1st Nat'l. Bank v. *Conway*, 94 Fed. (2d) 736, certiorari denied by this court in 58 S. Ct. 1047.

Griffith v. *Mass. Mutual Life*, 96 Fed. (2d) 57.

Campana Corp. v. *Harrison*, 135 Fed. (2d) 334, 336.

Burley, et al. v. *E. J. & E. Ry. Co.*, 140 Fed. (2d) 488.

It is a fundamental principle of law, that in nearly all instances, the question of an agent's authority is a question of fact and should be passed upon by a jury.

In *Wisconsin and Arkansas Lumber Co.* v. *Day*, 35 Fed. 563 at 566, the Court said:

> "Ordinarily the question of whether an agent has apparent authority to act for his principal is a question for the jury, when the contract is not in writing.

This is but an application of the rule that even though the facts are undisputed, if different inferences may be reasonably drawn from these facts, the question is for the jury."

II.

The letter of October 28, 1938 could not be considered as a valid release of the individual claims of respondents.

(a) There was no authority for the execution of any release by the General Chairman.

General Chairman Williams, under the Constitution of the By-Laws of the B. of R. T., has limited power and authority, his duties and obligations are set out in the B. of R. T. Constitution (Exhibit "G" filed with the court under order of July 26, 1941, p. 166, par. 7). Among his duties is the filing of grievances or claims for, and on behalf of, members or groups or lodges or all of the lodges of the particular roads of the B. of R. T. In order for him to receive a grievance for handling it is necessary that the local lodge hear and determine the matter and after passing upon the same submit it to him for handling. The General Grievance Committee consisting of the General and Local Chairman of the Lodge, and the General Secretary consults with the General Superintendent of the System. After this Committee makes any settlement it is required that within 30 days they notify the Secretary of the Lodge where the Grievance originated, and the member or members affected thereby of such action in writing (B. of R. T. Constitution, p. 168, par. 8½). The Petitioner herein was well acquainted with this procedure and the rules and regulations of the Brotherhood, for it was the Petitioner herein who introduced the B. of R. T. Constitution as an Exhibit.

We respectfully submit that on the original grievance

filed with the Board (Case No. 3537, R. 13) the aforesaid procedure had purportedly been adhered to up to the point of the settlement claimed by the Petitioner. However, as will be noted by Petitioner's Ex. C (R. 16), the same was executed by C. H. Williams, as General Chairman, and S. F. Johnson, Secretary, but there is no signature of the Local Chairman as heretofore shown to be required.

As stated in the Affidavit of the Respondents, filed herein (R. 45, par. 14, 15 and 16), the only authority vested in Williams as General Chairman was to present a Complaint to the "Board" to comply with Article 6 by furnishing engines and work at the times therein specified.

The officers of the B. of R. T. have no authority to waive private rights. As this Court has confirmed in *Illinois Central* v. *Moore,* 112 Fed. (2d) 959 (reversed by the Supreme Court on other grounds, 61 S. Ct. 754 at page 965), the United States Circuit Court of Appeals stated:

> "The collective agreement as such is made, defended and changed by the union, but the rights of each employee under it *are his own* and he may waive or assert them himself as he sees fit." (Italics ours.)

And at page 966 held:

> "The seniority provision of a collective agreement is an important and valuable part of the individual contracts of employment made thereunder. It has been held the union cannot waive or destroy it."

In the case of *Piercy* v. *Louisville & N. Ry. Co.,* 248 S. W. 1042, the court stated, p. 1045:

> "The officers of such organizations (order of railroad conductors union) are, as to the individual rights of its members, not to be deemed as their agents—agreements between organizations between employees and their employer, and designated primarily for the individual benefit of the members of the organization, *and not to place it within the power of the organization to change or modify the contract at its pleasure, so as*

to affect the individual rights of its members theretofore secured by the agreement.

"If the right of seniority may be changed or waived or otherwise dispensed with by the act of a bare majority of an organization, to which the one entitled thereto is a member, it would be building upon a flimsy foundation of sand, which might slip from under him at any time by the arbitrary action of the members, possibly to serve their own selfish ends in displacing him.

"* * * his agreement did not contemplate the submission by him to that body of the determination of any question involving his personal rights. But here *we have a personal right acquired by him as against the railroad company under contract, and we have the Order of Railroad Conductors asserting the right to waive for him the benefits of that contract.* It could not have been in contemplation by a member of such organization that he agreed when he entered to submit to the order for decision a controversy involving his rights as against a third party." (Italics ours.)

In the case of *Panhandle Ry.* v. *Wilson,* 55 S. W. (2d) 216, p. 219, conversely to the instant case the court stated:

"The rule is that individual members of a labor union are not bound by the contract between the union and the employers unless such agreements are ratified by the members of the union as individuals, and that in the absence of evidence of such ratification by a member, no rights accrue to him which he can enforce against the employer."

We submit that no rights of the members can be alienated without the member's consent, as the "Board" and lower Court did in the instant case.

We believe the case of *McCoy* v. *St. Joseph Belt Ry. Co.,* 77 S. W. (2d) 175, to be impelling in the instant case where the court states at p. 178:

"The evidence in plaintiff's favor is further to the effect that without any authority from the men, he

sought to change the seniority rights and positions of the employees of defendant, over their objections, including plaintiff.

"The evidence in plaintiff's favor is further to the effect that it was never agreed by the committee either to consolidate the lists or to change any working arrangements, nor was any vote taken on these matters, and the matters stated as agreed to in the letter above mentioned were not agreed to at all. In fact, no notice was given to the men's committee or to plaintiff of the change, other than the posting of the notice in the yards as aforesaid.

"Nor is there evidence that defendant's manager ever secured from the committee of defendant's employees, either orally or in writing, consent that the seniorities of defendant's employees might be changed to conform to the consolidated list, nor that such an agreement was made with defendant's employees either individually or as a group.

"There is nothing in the record from which it can be inferred that he individually participated in the making of the contract, or that he thereafter ratified it."

Page 182:

"The evidence in behalf of the latter sufficiently tends to show, and to authorize the jury to believe, if they did, that *what McQuaid did in composing the consolidated seniority list was merely his own unauthorized act without consulting those empowered to make such change, and defendant acted upon his said unauthorized act and made no investigation of his authority, nor made any effort to repair what was done when it learned the true fact about the matter.* But even if he did, *there is no evidence of any authority in the B. of R. T. to change or modify the contract so as to affect the individual rights of a member which rights were theretofore secured by the contract.*" (Our italics.)

See also the case of *Ahlquist* v. *Alaska, etc.*, 39 Fed. (2d) 348.

Certainly, a right to damages is as valuable a right as a seniority right, and we believe the court should not fail to follow these decisions in holding that a union, nor its officials, cannot waive or destroy it.

To hold otherwise would subject the millions of members of the various unions throughout the country to the whim or fancy and dishonesty of their officials and make uncontrollable dictators of them. We sincerely believe that such is not the intent nor the purpose of the union movement in this country, nor is it the intent or purpose of the courts of this country to so clothe them with such authority.

We also submit the case of the *Henry S. Grove*, 22 Fed. (2nd) 444, at page 446, paragraph 5 thereof, wherein the Court in passing upon an analogous situation to the instant case said:

> "Courts should frown upon any attempt made by employers of large numbers of laboring men to curtail their legal remedies and shut them off summarily from access to the courts, in the absence of a showing of complete mutuality. Large corporations, and especially insurance companies, are often too prone to take advantage of a situation, difficult even for the technician to understand."

We believe this last phrase is particularly pertinent to the facts in the instant case. See also *Burke* v. *Monumental Div.*, 273 Fed. 707.

If the so-called compromise agreement of the Petitioner—and we repeat, the Petitioner—which was drafted by them, was entered into without authority by the parties supposedly representing the Respondents herein, then it was invalid, and in that event the individual rights or claims of the Respondents cannot be lost thereby.

In Sub-Point E of Point II of Petitioner's brief they cite *Donovan* v. *Travers*, 285 Mass. 167, 188 N. E. 705, in which the Court states:

> "It is settled law that members of an unincorporated

> voluntary association, like the Brotherhood, are bound by the determination of the association's tribunal *if the decision is reached after observance of the formalities it prescribes,* after fair opportunity of presenting their case, *where there has been no excess of jurisdiction,* no bad faith or capricious, unreasonable or arbitrary action." (Italics ours.)

which we respectfully submit is the exact status of the instant case, and we wish to emphasize at this point that nowhere in counsel's brief has he answered our previous contention that the two officials of the Brotherhood did not act officially, for they failed to comply with the rules and constitution of the Brotherhood.

We believe the instant case is on all fours with the quoted opinions and that, in right and justice, they should be followed by this court in affirming the order of the United States Circuit Court of Appeals herein.

(b) There was no consideration received by respondents.

There was no consideration of any kind passed between the Petitioner and the Respondents for the execution of a release (as contended by Petitioner in the letter of October 28, 1938). We believe this is self-evident from an examination of Petitioner's Ex. "C" (R. 16) Case No. 5 thereof. The only thing that was presented by the Local Lodge to Williams, the General Chairman of the Grievance Committee, and to the "Board" was "starting time of switch engines of Whiting S. O. Yard" as set forth in the letter. (R. 17.)

This controversy was settled by the parties by the following (R. 17):

> "Settlement by agreement that the starting times for a 90 day trial period commencing November 15, 1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of starting times heretofore agreed upon and now being followed. * * *"

There was no release of any individual claims of these Respondents and no consideration passed to these Respondents for any release, as no claims of these Respondents were presented, argued nor settled by the letter of October 28, 1938.

The "Board," in considering the unauthorized claims that Williams presented to them, considered this letter as a release of the individual claims of the Respondents herein, and we submit that the "Board" by so doing committed a grievous error and therein made the refusal of the award invalid.

Petitioner herein, has not, and we believe cannot ask this court to believe that the agreement to abide by the terms of Article 6, can be considered as a consideration in settlement of Respondent's individual claims, because the law is well settled that an agreement to do something, which a person is already legally bound to do, is not a sufficient consideration to support any agreement.

As was stated in an Illinois decision *Litwin* v. *Litwin*, 30 N. E. (2d) 619, at page 622:

> "* * * promising to do what she was already bound to do (referring to a consideration). A promise of that kind was not a sufficient consideration for the assignment."

In the case of *Ferryboatmen's Union of California* v. *N. W. P. Ry.*, 84 Fed. (2d) 773, the court there held that something a party is required to do is not a sufficient consideration to support a release. This decision also held that there must be a meeting of the minds of the parties to the agreement.

We respectfully submit that in the instant case there was no meeting of the minds. This is evidenced by the subsequent unauthorized filing of claims purportedly on behalf of these Respondents before the National Railroad Ad-

justment Board, by Williams. The same Williams who signed Exhibit "C" (R. 16), set up by the Petitioner as a release. He filed the individual claims for Respondents herein, unauthorized it is true, but we refer to it, to show that he himself, had not considered the letter a release of individual claims, thereby exemplifying the absence of a meeting of the minds, as exemplified by Williams' statement of claim (R. 29), filed with the "Board":

> "There were no agreements reached whereby payment for violation of Article No. 6 of the Yardmen's Agreement would be waived as a result of withdrawal of Labor Board Docket No. 3537. *In fact that case held no claim for payment for time.* It was simply a case to settle the dispute as to the carrier's right to force the yard crews in the Whiting yard to work at times other than the fixed starting time provided for in Article 6. Certainly there are no words in the agreement reached which implies in any manner that the committee waived the right to claim for payment for violations prior to withdrawal of the case from the Board." (Italics ours.)

(c) It is self-evident from the contents of the letter that it is not a release of the individual claims of respondents.

From an examination of said letter (R. 16), as a whole, it is obvious that there were many cases pending involving the payment of money, but the only question these Respondents had pending on Case No. 5 (R. p. 17) was a grievance—"starting time of switch engines in Whiting S. O. Yard." (R. 17, case 5.)

The question of liability of the Petitioner for the payment of money on individual claims of these Respondents and others, was not presented in Labor Board Docket No. 3537, was not set out in the letter (R. p. 17), nor by any wording in the letter attributable to Case No. 5.

This court is too well aware of the multitude of cases holding that the wording of a contract or a pleading is held most strongly against the person drafting the same. We submit that the Petitioner herein drafted the letter (Ex. "C") (R. 16), and that if it had intended that said letter should act as a release of the individual claims of the Respondents herein, assuredly with the legal talent at their disposal, they could, and would, have clearly expressed that thought in clear, legal, understandable language.

From an examination of the letter we find that it enumerates 61 separate cases then pending before the National Labor Adjustment Board, between the Brotherhood of Railroad Trainmen, represented by C. H. Williams as Chairman and one of the other members of the Grievance Committee, and the Petitioners herein. Eleven of these cases involved grievances, including Grievance Case No. 5. Fifty involved claims for money for eighty-five or more individuals. Of these fifty, four involved personal injury claims. (Cases Nos. 46, 47, 48 and 54, R. 16.) All the others were time claims.

After examining all of these claims, it is evident that the wording of the concluding part of the letter could only adjust and compromise the *claims* then pending before the Board and submitted for settlement or compromise. We repeat, that the only thing pending before the Board as contained in said letter affecting these Respondents was a grievance, namely, to compel the Petitioner herein to abide by the terms of Article 6 of the agreement. (R. 14, Doc. No. 3537.) The question of liability of the Petitioner for the payment of individual claims to some of the Respondents herein was not presented to the "Board," enumerated in Case No. 5, discussed by the parties, mentioned in the letter specifically, nor by inference.

The fact that no one considered this letter as a release

of individual claims, we believe is evidenced by Williams a short time thereafter (R. p. 26) filing the unauthorized claims before the "Board," this, several months after the letter of October 31, and without the required authority of the local lodge, nor the Respondents, and without their knowledge.

We submit that it is self-evident that "claims" refer to claims for money, Ex. B (R. 15), as distinguished from "protests" or grievances as understood in the trade, and we therefore respectfully submit that neither the B. of R. T., nor the officials thereof, had the power or the right to compromise or waive any individual claims of the Respondents herein. The Petitioner was aware of the limited authority of Williams as Chairman of the B. of R. T., yet it interposed the letter as a release, when for the reasons heretofore stated there was no authority vested in Williams and Johnson to execute the same; the purported release was not executed by the three men required by the By-Laws of the B. of R. T.; there was no consideration to the Respondents, and the letter itself, from its contents does not purport to be a release of claims of these Respondents.

For this letter of October 28, 1938, to be a valid and substantial release of the claims of the Respondents herein, it is legally necessary that the following be present.

1. That there be competent parties.

We submit that we have shown the lack of authority in Williams and Johnson to act for or on behalf of the Respondent's individual claims. They were not the properly constituted committee provided for the purpose, by the B. of R. T.

2. There must be a proper subject matter.

We believe it is obvious that in the wording of the letter that the only matter pending between the parties and

before the "Board" was the grievance to compel the railroad, Petitioner herein, to abide by Article 6 of the Agreement. That subject matter cannot be transmuted to include the personal claims of these Respondents. There is therefore no proper subject matter.

3. Consent, or a meeting of the minds of the parties.

We believe we have illustrated that Williams himself, one of the parties to the Agreement, did not consider the letter a release of individual claims.

4. There must be a consideration.

Even the Petitioner, in the lower court, did not suggest that there was any consideration moving to these Respondents, from the Petitioner to validate the would be release. (See *Ferryboatmen's Union* v. *N. W. P. Ry. Co.*, 84 Fed. (2d) 773.)

Petitioner herein seeks to overcome all of the legal requirements of a well ordered and law abiding society, by its all embracing "collective bargaining"; such was not the intent nor purpose of unionism in America. And we respectfully submit that collective bargaining consists of obtaining rights, good working conditions, fair wages and just consideration for its members by the Unions, rather than the overriding of all legal precedent and the forfeiting of the members' individual rights.

III.

The award of the National Railroad Adjustment Board refusing to give effect to the individual claims of the Respondents herein is not res judicata of said individual claims.

(a) The Board had no jurisdiction of the individual Respondent's claims herein because there was no authority vested in C. H. Williams to present the same.

As stated in the affidavit (R. 45) the only authority vested in the General Grievance Committee, of which C. H. Williams was Chairman, was to present a grievance to the "Board" to force the Petitioner to comply with Article 6 (R. pp. 47, 48, paragraphs 11, 13, 14, 15, 16 and 19).

As heretofore enumerated under Point II (a), under the Constitution and By-Laws of the B. of R. T. of which the Petitioner had knowledge, the General Grievance Committee and the General Chairman, have limited authority. The cases and argument quoted under that point are applicable to the instant point, so we will not burden the court with a repetition thereof. However, we wish to state that under Rule 5 (Exhibit "G" heretofore filed herein under order of July 26, 1941) certain steps are necessary before any grievance or claim can reach the General Chairman, which was not done in the case decided by the National Railroad Adjustment Board upon which the Petitioner has pleaded *res judicata* (R. p. 26).

Certainly, a switchman, uneducated in the ways of law, releases, and authority, should not be held to have any greater power than an attorney at law, who is supposedly more learned in reference to rights and liabilities, and this court we believe without any citation being necessary will agree that an attorney without authority and without the

knowledge or consent of a client could not file a suit in his behalf and bind the client thereby.

We submit that in the instant case, the General Chairman C. H. Williams who took it upon himself to file individual claims for these Respondents without their knowledge or authority, cannot be held by that action to bind them.

If Williams did not have the authority to file the claim, then it must necessarily follow that the "Board" did not have jurisdiction of the claims nor of the parties. If they did not have jurisdiction then any order or award or refusal of award that might be entered by them would be void.

In the case of *Piercy* v. *Louisville Railway,* 248 S. W. 1042, the court held at page 1045:

> "The officers of such organizations (union) are, as to the individual rights of its members not to be deemed as their agents."

We wish to reiterate that the authority given to the representatives under the Act and under the constitution of the Brotherhood does not anywhere include the right to representation for "claims for pay or claims for breach of contract," but, on the contrary, only disputes concerning rates of pay, rules or working conditions.

We wish to submit the consensus of authority on this point as evidenced by 63 Corpus Juris, page 663, Par. 14:

> "A trade union is not the agent of a member for the purpose of waiving any personal right he may have, but only for the limited purpose of securing for him, together with all other members, the objects of the union."

The lower court, before whom this case was decided, previously held in the case of *Griffin* v. *Chicago Union Station,* 13 Fed. Supp. 722, p. 724, upon a claim that the member was represented before the "Board" by the Union; that

such was not the fact, that no notice had been given the complaining member as to his individual rights, and that those rights could not be waived or impaired by the action of the Union officials before the "Board." The same legal principle should have been applied in the instant case.

The Respondents do not deny that the officials of the Brotherhood were authorized to file a complaint before the "Board" to compel the Petitioner to adhere to Article 6 of its labor agreement. The officials' authority was limited to this act and purpose. The agency created was a limited or specific agency and was to be terminated as soon as the purpose for which the agency was created was served. The Petitioner apparently fails to realize that the authority which was conferred upon the aforesaid officials by the Respondents concerned the "specific performance" of Article 6 of the labor agreement and did not concern the individual rights of the various Respondents, the said individual rights of the Respondents arising out of the breach of the labor agreement by the Petitioner.

It is a well established legal principle that an agent who is appointed for a particular purpose is a special agent and his authority must be strictly construed and must be measured by express direction given by the principle. A person who deals with a special agent is ordinarily bound to ascertain the scope and extent of the special agent's express authority. See *N. Y. Life Ins. Co.* v. *Horton*, 9 Fed. (2nd) 320; *Monson* v. *Kill*, 144 Ill. 248; *Burba* v. *Baltic American Line*, 233 Ill. App. 132

(b) Respondents had no notice of any hearing nor of the pendency of any hearing.

As specifically set out in the U. S. C. A. 45 par. 153 (j), "Parties may be heard either in person, by counsel, or by other representatives, as they may respectfully elect, and the several divisions of the Adjustment

Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

We respectfully submit that the statute is mandatory upon the "Board" to give notice of all hearings to the employee involved in any dispute before them.

Nord v. *Griffin*, 86 Fed. (2d) 481, involves seniority rights which had been denied by the decision of the "Board", because of the unauthorized action of the Brotherhood in the presentation of the case. The Court held that by reason of lack of notice of the hearing, the employee was not accorded due process of law as guaranteed by the Fifth Amendment to the Constitution and, therefore, the order of the "Board" was void.

We respectfully submit that the instant case is in this respect analogous to the decision in the Nord case and that, therefore, the denial of the award by the "Board" in the instant case is void for lack of notice to these Respondents. (R. 48, par. 17, 18.) This fact is uncontroverted yet the Petitioner evades the same in their brief and seeks to gloss over it by the statement that "collective bargaining" justifies disregarding thereof, and states that the notice to the Union representative is sufficient.

(c) The award of the National Railroad Adjustment Board is not final because the statute under which said Board operates specifically excepts money awards from being final.

Even if these Respondents had given authority to the General Grievance Committee to file individual claims for them before the National Railroad Adjustment Board, and even though they had notice and knowledge of the pendency of said hearing, the award would still not be final. As our authority for said statement we submit that the Statute un-

der which said "Board" operates (U. S. Code Ann., Title 45, par. 153, sub-par. M) states:

> "and the award shall be binding upon both parties to the dispute except insofar as they shall contain a money award."

Petitioner construes this clause literally and submits to the court the proposition that unless an employee is actually awarded a cash sum by the Adjustment Board, the findings of said "Board" are final and binding and the employee has no right of review. We submit that the word "contain" as used in the statute actually means "concern," and that the statute should be construed to read, that the awards shall be final and binding, "except insofar as they shall *concern* a money award."

If Petitioner's contention is correct, it would mean that an employee who had petitioned the "Board" for a money award and who was unsuccessful in obtaining such an award, could not have the ruling of the "Board" reviewed. According to the reasoning in *Washington Terminal* v. *Baswell*, 124 F. (2d) 235, this is a violation of due process and the statute would be unconstitutional.

This Court is undoubtedly well familiar with the rule that if a statute is capable of two constructions, the courts will adopt a construction that will make the statute constitutional and valid. Therefore, we submit that our suggested construction of the statute should be adopted and followed.

Certainly, the award asked for by Williams was a money award, and though it was not awarded, it "contained" or "concerned" a money award.

As was stated in the case of *Illinois Central* v. *Moore*, 112 Fed. (2d) 959, at page 966 (reversed on other grounds, 61 S. Ct. 754):

> "The individual on his individual contract of em-

> ployment may seek reinstatement with pay through the railroad officers or through the Board, or he may, *before or after* pursue those remedies, acquiesce in the discharge, and ask damages for a breach of contract at law." (Italics ours.)

The court stated also in that case (p. 964), in referring to the handling of grievances or claims—

> "and then may be referred to the Adjustment Board. Awards are final except as to a money award." (Citing authorities.)

In the case of *Stephenson, et al.* v. *New Orleans & N. E. Ry. Co.*, 177 So. 509, wherein an award of the "Board" was pleaded as a defense, as in the instant case, the court said, p. 517:

> "Congress did not empower the Board to impair the obligations of an existing contract or to disturb the harmonious relations existing between a carrier and its employees."

It further states, p. 519:

> "Then most assuredly the employees of a carrier against whose interest and seniority rights an award has been made are not left without remedy in all the courts of the land."

And in commenting on the right of an employee to go to a court for relief despite an adverse decision by the "Board," the court states, p. 519:

> "Such an employee who has lost his cause before the Board must necessarily resort to a state court of competent jurisdiction or lose the property rights involved in a seniority contract with his employer, unless other Federal grounds are present."

We submit that in the instant case other Federal grounds were present, and we have appealed to the Federal Court for the assertion of a private right that could not be revoked by the adverse decision of the National Railroad Adjustment Board.

To the same effect see also:

System Federation v. *La. Ry.*, 119 Fed. (2d) 509.

See also:

Rentschler v. *Missouri Pacific Ry.*, 253 N. W. 694.

IV.

The Section of the Railway Labor Act Which Provides That the Award of the Adjustment Board Is Final and Binding, Except When the Same Contains a Money Award, Violates the Due Process Clause of the Fifth Amendment to the Federal Constitution.

We wish to respectfully point out to the court that under the Act under which the National Railroad Adjustment Board functions (U. S. Code Ann., Title 45, par. 153), when an award is entered against the employer and he refuses to comply therewith, it is necessary for the employee to file a suit at law, which is a trial *de novo*. The employer in that suit may set up any defense that he chooses, and in effect, obtain a review of the decision of the "Board."

If, however, the employer is successful before the "Board", and the award is entered against the employee, if said award is to be held a final adjudication of the rights of the party then there is no further remedy afforded to the employee.

This situation affords the employer a right of review of the decision of the "Board", and refuses the same right of review to the employee. We respectfully submit that this inequality violates the due process clause of the Fifth Amendment to the Constitution of the United States.

In the case of *Washington Terminal Co.* v. *Boswell*, 124 Fed. (2d) 235, on page 244, the court said,

> "Though the effects of an award favorable to an employee are substantial, they do not conclude the employer's rights."

> "The Board cannot enforce its awards. That is left for the courts to do. It can be done only in a suit *de novo*. In the suit the cause of action is upon the award, to secure its enforcement. But the parties are not limited by its provisions in the trial. The employee must set forth "the causes for which he claims relief" and the Board's order. 45 U. S. C. A. Sec. 153, First (p). The suit must "proceed in all respects as other civil suits," except that the order and findings "shall be prima facie evidence of the facts therein stated." Ibid. The carrier is limited in no way as to its defenses or the evidence it may wish to present. Its day in court in the enforcement suit is a full one . . . The short answer, therefore, to the argument that the administrative proceeding is wanting in due process is that, if so, this is entirely immaterial. Any failure in this respect is cured by the full and complete opportunity which the carrier is given in the enforcement suit to make its defense under all procedural and substantive guaranties of the Constitution."

This quotation unequivocally illustrates that an adverse decision by the "Board" does not conclude the employer's rights. On the other hand, however, an adverse decision by the "Board" against the employee does conclude the employee's rights.

On page 245, of the *Boswell* case, the court states,

> "If the statute creates inequality in this respect, it is perhaps the other way. When an award is unfavorable to an employee, the statute makes no provision for him to challenge it by suit to set it aside or otherwise. So far as appears from the Act's explicit terms, the Board's decision is final. We need not determine whether the statute is conclusive in this respect or, if so, whether it would be so far invalid. In other words, the question is not before us whether an employee can maintain a suit for relief independent of the statute and of the award, after he has submitted

his case to the Board and received its adverse decision. That the statute, if applied literally in this respect, might be invalid as to the employee and that he might, therefore, have independent relief, does not mean that it would be invalid as to the carrier or that it should have such relief from the Board's adverse decision. Their situations are entirely different and so are the effects upon their rights of the award and of absence of opportunity to institute suit to review it. The employee's rights would be foreclosed, if the award against him were final. The employer's position, on the other hand, is much different."

On page 246, the court said,

"And in this lies a stronger answer. It is the fact that unless the employee institutes an enforcement suit, the carrier cannot be prejudiced in any legal sense by the absence of an opportunity to sue. The only purpose of such suit would be to set aside or nullify the award. But this is not necessary for adequate protection of the carrier's rights. The award is not self-enforcing or enforceable by the Board. It is merely a decision that the carrier should change its operating practice in the manner specified. It has the power of management and if it regards the award as contrary to its rights, it can maintain the existing practices. The act confers upon the employer the powerful advantage of the defensive position in regards to the award. It places the burden of enforcement upon the employee. It limits the time within which he may act. The period allowed is not unreasonable. If he does not act within it, presumably his right to do so is gone. If not, he loses at any rate the special advantages of the statutory suit."

This quotation clearly illustrates the respective positions of a losing employer and a losing employee before the Adjustment Board. If there is an award against the employee by the Adjustment Board, he can, for all practical purposes, disregard the same because it is of no effect

whatsoever as far as he is concerned. On the other hand, if the "Board" makes any finding against the employee, the adverse ruling of the "Board" may constitute a complete destruction of the employees property rights.

On page 246, the court said, in speaking of the carrier's rights,

> "In all this there is no essential unfairness. Certainly, there is none beyond the power of Congress to create in the regulation of such complex economic matters. The carrier is at full liberty to accept and comply with the award, or to reject and disregard it. If he chooses the latter course, the award has no effect upon its rights unless the employee institutes and succeeds in a suit to enforce it. If he does so, the carrier receives full constitutional protection in the suit."

In most instances, when a finding of the "Board" is against the employee, the latter loses certain property rights, and at the same time certain rights are given to the employer which he did not have prior to the decision or finding of the "Board". The employee has but one alternative, to accept the award of the "Board". On the other hand, if there is a decision against the employer, he has the choice of either accepting the award of the "Board" or rejecting the same. He does not have to comply with the award unless the employee files a suit in Court, predicated on such an award, and obtains the sanction of the Court. In other words, in the absence of any suit by the employee to enforce an award of the "Board" which is adverse to the employer, such award is absolutely meaningless. The statute denies the employee the more usual advantages of administrative decision, namely, immediate effectiveness, unless stay is secured, limitation of judicial review to questions of law, enforcement by public authority, etc. It gives him only decision, not action, by the "Board".

It puts upon him the whole burden of enforcement. If the employer has had his day before the "Board", and after it has lost, he is only confronted by an order, non-enforceable, except by suit. In fact, the employer is not only not denied his day in court, in the hearing before the "Board", but he is given another opportunity to have his day in court in the suit brought to enforce the award.

On page 251, the court said:

> "Finally, this is a suit for a declaratory judgment. The remedy is discretionary. We do not believe a carrier, consistently with the Railway Labor Act, could maintain a suit in equity to set aside an award or enjoin its enforcement. The statute seems clearly to exclude such suits by specifying enforcement suits solely as a *method of review.*" (Italics ours.)

In the dissenting opinion of Justice Stephens, on page 269, the following statement is found:

> "It would seem more logical to conclude that it would hardly have been the intention of Congress to exclude either the employees or the carrier from recourse to the courts for a determination of their contract rights, whether or not they lost before the Board. Indeed, the argument that the carrier cannot have recourse to the Courts because employees losing before the Board cannot sue either under the Act or at all begs the very question in issue, to wit, whether the procedure provided for by the Labor Act is exclusive."

The decision in the *Boswell* case was sustained by this Court by an evenly divided opinion, Justice Rutledge not taking any part in the rendition of the opinion. This, we submit, should be indicative of the Court's attitude in the instant case. Despite the fact that the Railway Labor Act does give the employer the right of review (enforcement suit), four of the Justices of the Supreme Court felt that he should be given an additional or a more direct

right of review of the "Board's" award. Since this is the fact, we may reasonably conclude that the court should certainly favor the employees in the instant cause, who are not given any right of review whatsoever, by the Act in question.

This feeling about the unfairness of the Act to the employee is concurred in, in the case of *Stephenson* v. *New Orleans & N. E. Ry. Co.*, 177 So. 509, at page 519:

> "Neither the carrier nor the employee against whose interest an award has been made, is given any right under the Act to go into the United States District Court as a party plaintiff or complainant."

Also, the District Court in the case of *Lane* v. *Union Terminal*, 12 Fed. Supp. 204, at page 205, states:

> "The act is silent, insofar as authority is concerned, for any person to enter the national court, save and except the 'petitioner' or 'any person for whose benefit such award was made'. The defeated had no right to enter court. He is given no privilege of court review. It must be assumed that the right of the court to 'enforce the order or set aside the order' will be taken upon the application only of the parties who are permitted to enter court."

To the same effect, see also, *Cook* v. *Des Moines Union Ry. Co.*, 16 Fed. Supp. 810.

REPLY TO BRIEF OF PETITIONER.

We have shown that if it is found that the award of the "Board" denying the claims of the Respondents is final, then Sections 153 (m) and (p) of the Railway Labor Act are unconstitutional. (Brief.)

On page 15 of its brief, Petitioner states that "Notice to the duly constituted officers of the Brotherhood is sufficient," and cite *Estes* v. *Union Terminal Co.*, 189 Fed. (2d) 768, in support of their statement.

Section 153 (j) of the Railway Labor Act provides:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board *shall give due notice of all hearings to the employee or employees and the carrier or carriers* involved in any disputes submitted to them." (Italics ours.)

In *Estes* v. *Union Terminal Co., supra,* the Circuit Court of Appeals stated that it is absolutely imperative that an employee involved in any controversy before the "Board" be given notice of the hearing, and that in cases involving two large groups of employees, notice to the duly constituted officers of the organization would *generally* be sufficient. The case at bar does not involve large organizations of employees. The Court in stressing the importance of giving notice to an employee of a hearing before the "Board," stated:

> "• • • illustrates how a single employee may be caught between the upper and nether mill stones in a controversy to which only a labor organization and a carrier are parties before the board."

The *Estes* case does not lay down the positive rule of law that the serving of notice upon officials of a union is sufficient compliance with the terms of the Railway Labor Act as the Petitioner would have us believe. In fact, if any inference is to be drawn from the case, it should be to the contrary.

Petitioner places great emphasis on the case of *Berryman* v. *Pullman Co.*, 48 F. S. 542, which it cites on page 16 of its brief. The facts of that case are not analogous to the facts of the instant cause. In the *Berryman* case, the defendant filed an affidavit in support of its motion for a summary judgment, and the plaintiff admitted all the facts alleged in said affidavit. The plaintiff was properly represented before the "Board" and there was no question present involving the authority of his representative. There was no question present involving the jurisdiction of the "Board" over the subject matter and the parties to the action. There was no question present involving the giving of notice of the hearing by the "Board", to the parties to the suit. Finally, the *Berryman case* is a District Court case.

On page 28 of its brief, the Petitioner contends that the Respondents are not entitled to judicial relief because they have failed to exhaust their remedies before the tribunals of the Brotherhood.

The law is well settled that a person is not required to perform a useless act. The Respondents had no knowledge of the execution of the letter of October 28, 1938, nor of the filing of their individual claims before the "Board", until after the rendition of the adverse decision by the "Board."

Does the Petitioner wish to contend that after the "Board" decided the claims adversely to the Respondents herein, the latter should have sought relief before the

tribunals of the Brotherhood? Any such action by the Respondents would have been absolutely useless. We reiterate that the law does not require a person to perform a useless Act.

Petitioner, throughout its brief, attempts to inject collective bargaining into the case. We submit that collective bargaining is irrelevant to the issues. Collective bargaining pertains to the collective rights of labor and not to the individual rights of individual employees for damages.

In the case of *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 360, this Court declared that an employee has the election of filing his claim or grievance with the "Board", or filing it in a court of law. This right of election given to the employee negatives the contention of the Petitioner regarding collective bargaining.

Section 153(j) of the Railway Labor Act provides that in a hearing before the "Board",

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, * * *."

Section 151 of the Act provides, in part,

> "The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them."

By virtue of these two sections of the Act, an employee can represent himself before the "Board", or choose any representative he desires, his choice not being limited to a union organization, or to a union official or member. The very language and tenor of the Act negatives the argument of the Petitioner that collective bargaining is an issue in the instant cause.

On page 26 of its brief, Petitioner cites the case of *Smith, et al.* v. *Texas N. O. R. Co.*, 118 Fed. (2d) 75, as

supporting its theory that when a compromise agreement is executed with the designated representatives of the employees, all employees are bound thereby, and that the principles of common law agency are not applicable.

The quotation which the Petitioner cites from the *Smith* case glaringly illustrates its miscomprehension of the law enunciated in that case. The representatives of the union were not acting as agents of the decedent, but were acting as agents of the children of the deceased. The Court said,

> "The jurisdiction is persuasive that *they* were on notice and were *represented;* and, therefore, *their* rights were decided at the compromise between the employees as a group and the carrier." (Italics ours.)

The children of the deceased were properly represented by agents, and a careful reading of the quotation cited by Petitioner discloses that the children of the deceased may have been estopped from attacking the settlement. They had been given notice and did not act upon the same. The conclusion which the Petitioner draws from the *Smith* case is unwarranted.

Petitioner's arguments on the other points of its brief, we submit have been answered by our summation of the law in the brief, hence we shall not repeat them.

Conclusion.

We, therefore, respectfully submit that the Petitioner herein, presents no justiciable right to reverse the decision of the United States Circuit Court of Appeals; that they have correctly decided the issues presented and that this judgment should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

VS.

G. W. BURLEY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition for Rehearing.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition for Rehearing.

Elgin, Joliet and Eastern Railway Company, a corporation, the above named petitioner, presents this petition for a rehearing and, in support thereof, respectfully shows:

I.

The majority opinion inadvertently misrepresents petitioner's position with reference to the rights of individual employees under the Act. Petitioner did not regard these issues as being present in the case at bar and took no position relating to them. Rehearing should be granted to give the petitioner an opportunity to state its position.

The majority opinion at page 16 states:

> "Petitioner urges that, notwithstanding the proviso and Section 3 First (j), the effect of the provisions taken as a whole is to make the collective agent the employees' exclusive representative for the settlement of *all* disputes, both major and minor, and of the latter 'whether arising out of the application of such [collective] agreements or otherwise.' The argument rests primarily upon Sections 2 First, Second, Third, Fourth, Sixth, and 3 First (i). It emphasizes the carrier's duty to treat with the collective representative, as reinforced by Sections 2 Eighth and Tenth.
>
> "Petitioner does not squarely deny that the aggrieved employee may confer with the carrier's local officials either personally or through *local* union representatives in accordance with the proviso to Section 2 Fourth. But this right, if it exists, is regarded apparently as at most one to be heard, since in petitioner's view the power to make settlement by agreement is vested exclusively in the collective agent. Cf. §§ 2 Sixth and 3 First (i)."

This statement does not correctly set forth petitioner's view with reference to the construction of the Railway Labor Act.

Petitioner does not contend, for example, that the employee representative has power to settle personal injury claims of employees, for two reasons—(1) claims for

ersonal injuries do not grow out of grievances or out f the interpretation or application of agreements con- erning rates of pay, rules, or working conditions, and 2) claims for personal injuries and their settlement are ot the proper subject matter of grievances or of labor greements. They have never been so considered by your etitioner.

The same observation applies with reference to *any ther* dispute having no relation to rates of pay, rules nd working conditions. Your petitioner has never con- ended that the designated representatives of the em- loyees are the "exclusive representatives" of the em- loyees for the settlement of *such* disputes. The term exclusive representative" was never used by your peti- ioner in its briefs or argument before this Court. That erm is foreign to the Act. It does exist, however, in he National Labor Relations Act, Sec. 9 (a), as far as argaining for *the unit* is concerned.

Furthermore, your petitioner has never contended that he designated representative of the employees is the *exclusive* representative" for the settlement of *"all* isputes" and in particular, all *grievances* relating to inter- retation or application of agreements concerning rates f pay, rules or working conditions. The rights of in- ividual employees to *enforce* and *settle* their grievances— *hen clearly asserted*—are admitted.

Your petitioner admits that the designated representa- ve should be "notified and dealt with concerning the atter which from an employee's point of view . . . may rovide a leverage for taking away other advantages of e collective contract." (*Order of Railroad Telegraphers Railway Express Agency, Inc.*, 321 U.S. 343, 347.)

Article 25 of the schedule executed by your petitioner nd the Brotherhood should read as if the following

phrase from paragraph Fourth of Section 2 of the Act were incorporated into the schedule:

> ". . . *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, . . ."

Paragraph Eighth of Section 2 of the Act in part states:

> ". . . The provisions of said paragraphs [including Fourth] are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them."

Paragraph Tenth of Section 2 of the Act provides that the willful failure or refusal of the carrier to comply with the terms of the Fourth paragraph shall be a misdemeanor. Upon conviction, the carrier shall be subject to a fine of not more than $20,000 or imprisonment or both for each offense.

Your petitioner admits that *any employee individually* may "confer" with your petitioner during working hours *without loss of time* in an effort to settle any grievance. This has always been the practice of your petitioner, notwithstanding its recognition of the Brotherhood as the designated representative of the employees. Furthermore, an *individual* employee of your petitioner, whether or not he is a member of the Brotherhood, "either personally or through *local* union representatives" may "confer" with local representatives of your petitioner at their various offices along the road. Such individual employees have done so in the past. Such *local* union representatives do so every day. They "confer" regarding grievances. They also make settlements. No clause in the labor agreement or schedule between your petitioner and

the Brotherhood prevents such individual or local settlements. Article 25 of the schedule expressly permits settlements with *local* union committees.

However, if the grievance discussed is a matter relating to the interpretation or application of agreements concerning rates of pay, rules or working conditions, any agreement to change or to make a new interpretation of the collective agreement is made only with the designated representatives.

Even as to *all grievances*, the Act imposes upon the carrier the duty to confer with the designated representatives of the employees. This statutory duty was noted in the opinion of the majority at page 14 and 15, note 26. Section 2, Sixth, of the Act in part provides:

> "In case of a dispute between a carrier or carriers and its or their employees, arising out of *grievances* or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives . . . of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: . . ." (Emphasis added.)

This duty to confer is to bring about agreement, if possible. (Cf. majority opinion, p. 19.)

Obviously, the Brotherhood is not the "*exclusive* representative" of an individual employee *seeking to enforce his grievance after* settlement with the carrier has failed. The individual employee need not refer his grievance to the Adjustment Board for adjudication.

Petitioner's brief, p. 36, stated:

> "Furthermore, the respondents in the first instance were not required to present their claims before the

> Adjustment Board. They could have directed their designated representatives to file a complaint in court and, thereby, obtain judicial determination of their claims."

As pointed out in petitioner's reply brief, p. 13, "court adjudication is always available to designated representatives *or employees* before they *elect* to file a claim before the Adjustment Board" (emphasis added), in accordance with the decision of this Court in *Moore* v. *Illinois Central Railroad Company*, 312 U.S. 630. In that case this Court held that after endeavoring to settle a grievance with representatives of the carrier, an individual employee is not required to refer his claim to the union for enforcement or to the Adjustment Board for adjudication. He may elect to file in court a claim for his grievance and disregard the adjudicatory processes of the Board and the representatives of the union.

These rights of individual employees, however, although clearly recognized by your petitioner, were never issues in the case at bar. They were never discussed by your petitioner. All arguments of your petitioner were made only with reference to undisputed facts in the case at bar and were not intended to apply to cases of *individual employees* who had revoked the authority given to their representatives and who were *individually seeking remedies for their grievances.* In the case at bar, your petitioner claims that employees individually and specifically designated their representatives, that is, the general grievance committee of the Brotherhood, to act for them not only in the execution of the settlement agreement of October 31, 1938 but also in the filing of the second claim before the Adjustment Board.

The acts of the respondents from November 23, 1938 until September, 1940 were consistent with that authority so given to the Brotherhood officials. *All re-*

spondents were members of the Brotherhood. The rules of the Brotherhood regarding which each respondent is charged with notice, granted this specific authority from each individual respondent to the general grievance committee. *This "individual" authority "individually" granted was not revoked prior to the time the Board entered the award in favor of your petitioner.* No notice of revocation was given to your petitioner or to the Board during such period of years. No actions of the respondents during this period were *inconsistent with* this specific authority granted to the Brotherhood officials. When the respondents "individually" grant such specific authority to the Brotherhood officials by becoming members of the Brotherhood, they "specifically" and "individually" authorized an affirmative course of conduct on behalf of the Brotherhood officials for their benefit. This exercised authority after settlement with the carrier fails and the Brotherhood files the claim with the Board cannot later be *interrupted* or *revoked* except *by notice given to the Brotherhood officials* to cease their efforts in the employees' behalf, by notice to the carrier not to treat with the Brotherhood officials and by notice to the Board, if the claim is pending before it, that the Brotherhood is no longer authorized to represent them or by the employees exercising their own rights with respect to grievances and dealing for themselves.

Petitioner does not regard the right of an individual employee "to confer" with any of its representatives, including its highest executive officers, merely as a right "to be heard" as the majority, in their opinion infer. As heretofore stated, whether the individual employee is a member of the Brotherhood or is not a member he has the right to confer with any representative of your petitioner, including its President, in the event that con-

ferences with local officials have not resulted in settlement of the grievance, including grievances arising out of the interpretation or application of agreements concerning rates of pay, rules or working conditions. As to the latter type of grievances, however, agreement with the designated representatives must be made in order that any adjustment or settlement reached will not deprive such representatives of the class or craft of their right to be consulted and *to bargain* and to *safeguard the bargaining.*

As stated by the Court in *The Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U. S. 342, 344:

> "Hence effective collective bargaining has been generally conceded to include the right of the representatives of the unit *to be consulted* and *to bargain* about the *exceptional* as well as the routine rates, rules, and working conditions." (Emphasis added.)

Furthermore, as to all *grievances,* it is the *duty* of your petitioner, imposed upon it by Sec. 2, Sixth, of the Act, *to confer with designated representatives of the employees and arrive at* a settlement agreement, if possible.

Your petitioner did not contend with reference to grievances, that "the power to make settlement by agreement is vested exclusively in the collective agent" as set forth in the majority opinion quoted. If an individual employee has the right to bring suit in court individually, as this Court held in the case of *Moore* v. *Illinois Central Railroad Company, supra,* he has the right to *settle* his grievance *individually* in addition to the right to be *heard individually.* However, *this right must be asserted.* An individual cannot slumber upon it, permit his designated representatives to proceed to enforce his individual rights in accordance with specific authority previously granted them and not revoke that authority by proper notice,

or by acts inconsistent with the agency relationship, which amounts to revocation by implication. If the *individual* employee sets in motion specific authority for his designated representatives to act for him relating to grievances, as was done by the rules of the Brotherhood in the case at bar, notice of revocation of that authority should be given to all concerned by the individual employees before the designated representatives file the claim with the Board. In the absence of such notice, actual or by implication, if the designated representative proceeds to act, as did the Brotherhood officials in the case at bar in executing the settlement agreement of October 31, 1938, and in filing the second claim before the Board, and an award is entered by the Board denying the claim, the individuals are bound thereby.

The majority opinion at page 17 states:

> "In accordance with this view 'either party,' within the further provision of Section 3 First (i) authorizing reference of the dispute to the Adjustment Board 'by petition of the parties or by either party,' refers to the carrier or the collective agent, not to the aggrieved employee acting otherwise than by the collective agent. Hence, 'parties' as used in Section 2 First (j) is given similar meaning. Consequently the collective agent also has exclusive power to submit the dispute to the Board and to represent aggrieved employees before it.
>
> "Petitioner's view has been adopted, apparently, in the general practice, if not the formally declared policy of the Adjustment Board. And this, it seems, has been due to the position taken consistently by the employees' representatives on the Board, over the opposition of carrier representatives. The unions, apparently, like petitioner in this case, interpret the Act as not contemplating two distinct systems for the settlement of disputes, one wholly collective for major disputes, the other wholly individual for minor ones. . . ."

These statements from the opinion of the majority d not correctly represent your "petitioner's view" or co struction of the Act.

Your petitioner admits that the Act gives an *individu* employee the right to file a claim before the Adjustme Board. However, the individual employee or groups employees *individually must exercise this right. No a tempt was made to exercise it in the case at bar. The que tion never was an issue in the case.*

Your petitioner is not of the opinion that "the colle tive agent also has *exclusive* power to submit the dispute the Board and to represent aggrieved employees before it. (Emphasis added.) *These matters, also, never were i issue in the case at bar. Consequently your petitioner too no position with reference to them.*

Paragraph (j) of Section 3 in part provides:

> "Parties *may* be heard either *in person*, by counse or by other representatives, *as they may respective elect*, and the several divisions of the Adjustme Board shall give due notice of all hearings to the em ployee *or* employees and the carrier or carriers i volved in any disputes submitted to them." (Emphas added.)

Furthermore, paragraph (i) in part provides:

> "The disputes between an *employee* or group of em ployees and a carrier . . . *may* be referred by pet tion of the parties or by either party to the appr priate division of the Adjustment Board. . . ." (Em phasis added.)

Paragraph (p) in part provides:

> "If a carrier does not comply with an order of division of the Adjustment Board within the time lim in such order, *the petitioner, or any person* for whos benefit such order was made, *may* file in the Distri

> Court . . . a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. . . . " (Emphasis added.)

These provisions of the Act clearly grant to an individual employee the right to file his claim before the Board.

It is important to note, however, that the provisions of the statute granting an *individual* employee the right to file *individually* before the Board provide that his petition *"may be referred,"* that he *"may be heard"* in person if he so *"elects"* and that he *"may file"* a petition in the District Court. In other words, *the individual has the right if he exercises it.*

His individual right to file a grievance before the Board is not exercised by individually authorizing the Brotherhood officials to prosecute his grievance before officials of the carrier and, "failing to reach an adjustment" with the carrier, in failing to *elect* to file a claim for his grievance either before the Board or in court. If the union continues to prosecute the grievance, either by filing a claim before the Board or by electing to file a suit at law, as it may elect, the carrier must assume that the *individual* has *not elected* to file his claim individually before the Board or individually in court. *The individual authority granted by each respondent to the Brotherhood continues until revoked.*

The importance of the word "may" as contained in Section 3, paragraph (i) of the Act has been noted by this Court in the case of *Moore* v. *Illinois Central Railroad Co.*, 312 U.S. 630, wherein the Court, page 634, states:

> "But respondent says that there is another reason why the judgment in its favor should be sustained. This reason, according to respondent, is that both the District Court and the Circuit Court of Appeals erred

in failing to hold that Moore's suit was prematurely brought because of his failure to exhaust the administrative remedies granted him by the Railway Labor Act, 44 Stat. 577, as amended, 48 Stat. 1185, 45 U.S.C. § 151, *et seq.* But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. In support of its contention, the railroad points especially to § 153 (i), which, as amended in 1934, provides that disputes growing out of grievances or out of the interpretation or application of agreements 'shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.' . . . It is to be noted that the section pointed out, § 153 (i), as amended in 1934, provides no more than that disputes 'may be referred . . . to the . . . Adjustment Board . . .' It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578) had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute shall be referred to the designated Adjustment Board by the parties, or by either party. . . .' This difference in language, substituting 'may' for 'shall,' was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. . . ."

The provision in paragraph (j) hereinbefore quoted requiring that "the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them," does not require that notice be given to an *individual* employee *when he has elected not to file his claim individually before the Board.*

In other words, paragraph (j) should be construed to read:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or *groups of* employees, *if he or they elect to be heard individually, to the counsel for the employee or groups of employees, if he or they elect to be heard by counsel, or to the designated representatives of the employee or groups of employees, if he or they have not elected to be heard individually and the dispute has been referred to the Board by the designated representatives,* and *to* the carrier or carriers involved in any disputes submitted to them." [Words supplied noted by emphasis.]

The economy of words in paragraph (j) of the Act should not upset the whole scheme of the Act. When reasonably construed, your petitioner submits that they do not.

An individual employee has made no election to prosecute his grievance individually after settlement with the carrier has failed unless he (1) gives proper *notice of the revocation of his individual authority* previously granted to the designated representatives of the employees, *or* (2) unless he acts inconsistent with individual authority which previously may have been granted to the union representatives so that such actions amount to a revocation and election to act individually.

In the case at bar there was no election. The individual respondents did not elect to file before the Board, although they had the right to do so. Failing adjustment of their grievance by the Brotherhood officials with the carrier, the individual employees in the case at bar failed to elect to file their claim in court, although they then had the right to make such an election. *Their individual election*

to file a suit at law after the Board denied their claim came too late. This point was considered at page 9 of your petitioner's reply brief, as follows:

> "Nevertheless, once the case is referred to the Board by the designated representative and the Board has decided it and denied the claim of respondents, respondents later cannot assert the same claim in court. The policy of the Act that non-money awards of the Board are final and binding deprives courts of power, directly or indirectly, to pass upon the same claims adjudicated by the Board, except in the special cases for which provision is made in paragraph (p) of the Act, which provides the exclusive remedy for court review. *Cf. Baltimore and Ohio R. Co., et al.* v. *Brady,* 288 U.S. 448, 457; *I. C. C.* v. *United States,* 289 U.S. 385, 394.
>
> "When the designated representative files a claim before the Board, the action on the labor agreement at law which therefore existed is merged in the award. If this result does not follow, every time the claim filed before the Board by the designated representative is denied, the temptation will be great for each employee involved to assert that the designated representative did not have specific authority to file the claim and that, therefore, the employee should have another day in court by filing a suit at law for damages. This reasoning would destroy the policy of Congress to make non-money awards final and binding, except as provided in paragraph (p), and would result in the intended adjudication of the Board being a mere ritual with no legal significance."

Stated otherwise, when the respondents in the case at bar joined the Brotherhood they individually and specifically authorized the officials of the Brotherhood to settle *such grievances as might arise,* including the grievances in the case at bar. They individually assented to such authority, as was exercised in the case at bar by the Brotherhood grievance committee, by accepting the provisions in the Brotherhood's constitution and rules hereinafter

quoted at length, authorizing the Brotherhood officials to make settlements relating to grievances. This individual specific authorization constitutes a *continuing authority from the individual respondents to the Brotherhood officials* until the actions of individual respondents amount to a revocation. *No such revocation was made in the case at bar.* Each individual when he became a member of the union assented to such authority as the Brotherhood grievance committee might exercise. These rights individually granted to Brotherhood officials "become rights more of shadow than of substance" if each individual member and respondent here could upset the carefully created agency and planned procedure of the Act by revoking the authority specifically given to his Brotherhood officials *after* an award has been entered by the Board denying his claim.

The statement from the majority opinion hereinbefore quoted to the effect that "the unions, apparently, like petitioner in this case, interpret the Act as not contemplating two distinct systems for the settlement of disputes, one wholly collective for major disputes, the other *wholly individual* for minor ones" (emphasis added) is not in accord with your petitioner's construction of the Act.

Your petitioner realizes that disputes relating to the question of the designation of representatives of the employees of a carrier may be referred to the Mediation Board in accordance with paragraph Ninth of Section 2. Furthermore, disputes concerning *changes* "in rates of pay, rules or working conditions not adjusted by the parties in conference" and any other dispute, excluding grievances, which are not referable to the Board and which have not been adjusted "in conference between the parties or when conferences are refused," may be referred to the Mediation Board in accordance with the

provisions of paragraph First, Section 5. As to these matters, the Mediation Board has exclusive jurisdiction.

Your petitioner further recognizes that there are other types of "disputes" generally referred to as grievances which may be characterized as "minor" ones. Your petitioner does not admit, however, that these are "wholly individual." They may be, and generally, are wholly collective. Individual authority granted to the Brotherhood officials, and not revoked, as here, makes them wholly collective. They may, also, be part individual and part collective.

For example, if the individuals, as in the case at bar, specifically authorize their designated representatives to act for them in the presentation of grievances by giving general authority to their representatives to settle such grievances as might arise, by becoming a member of the Brotherhood and thereby accepting its constitution and rules authorizing officials of the Brotherhood to make such settlements or prosecute such grievances, then the prosecution of the grievance before the officials of the carrier may be considered to be "wholly collective." If the grievance committee of the Brotherhood in prosecuting the grievance fails "to reach an adjustment in this manner", the continued prosecution of the grievance by filing a claim before the Board and a suit of the District Court to enforce the Board's award, if necessary, may be considered to be wholly collective because the individual *did not elect* either to file his claim individually with the carrier or, after his designated representatives failed to reach an adjustment with the carrier, *failed to elect* to file his claim individually either before the Board or in court. But if the individual elects to sue in court on an award of the Board in his favor, the action (and grievance) becomes individual.

In the case at bar, there was no rival union as in the case of *Hughes Tool Company* v. *National Labor Relations Board*, 147 F. 2d 69. No respondent was a non-member of the Brotherhood whose individual claim clashed with the claims asserted by Brotherhood officials. *All respondents were members of the Brotherhood.* In the *Hughes Tool Company* case, however, employees were represented by United Steelworkers of America, C.I.O., the exclusive collective bargaining representative for the unit, Independent Metal Workers Union and an affiliate of American Federation of Labor. United Steelworkers of America claimed that no grievances should be handled which were brought in by the Independent on behalf of Independent members.

The court held that an inexperienced individual employee could ask a more experienced friend to assist him in the presentation of a grievance but could not present his grievance through any union except that which represented the majority of employees and was so certified by National Labor Relations Board, that in any case where the grievance *raises a question of the meaning of the contract,* or presents a situation not covered by the contract, but *concerns a situation regarding which an agreement ought to be made,* the certified representative should participate in the grievance processing. Bargaining and not mere decision is then involved.

Thus, in every case under the National Labor Relations Act where a grievance really involves *bargaining for the unit* or an *interpretation of the bargaining,* representatives of the certified union have the right to be present as the exclusive bargaining representative, even though the grievance may have been filed by an employee individually.

There can be no doubt of the necessity of similar procedure under the Railway Labor Act because Sec. 2, Sixth,

imposes the duty upon a carrier to confer with designated representatives of the employees regarding any dispute between a carrier and its employees "arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions."

After referring to the *Hughes Tool Company* case, the majority opinion (page 20) stated:

> "The statute does not expressly exclude grievances from the collective agent's duty to treat or power to submit to the Board."

But the statute does expressly (Sec. 2, Sixth) *include grievances* in the collective agent's duty "to confer" with the carrier.

The opinion of the majority at page 17 states:

> "Accordingly, petitioner urges that the statute, both by its terms and by its purpose, confers upon the collective agent the same exclusive power to deal with grievances, whether by negotiation and contract, or by presentation to the Board when agreement fails, as is given with respect to major disputes. And the aggrieved employee's rights of individual action are limited to rights of hearing before the union and possibly also by the carrier.
>
> "We think that such a view of the statute's effects, in so far as it would deprive the aggrieved employee of effective voice in any settlement and of individual hearing before the Board, would be contrary to the clear import of its provisions and to its policy."

Your petitioner agrees with the second paragraph of the language quoted. The first paragraph does not represent your petitioner's construction of the statute.

As heretofore stated, *the question whether an employee as an individual may file a claim relating to a grievance either before the officers of the carrier or before the Board*

was never an issue in this case. Your petitioner believes that the individual has such a right. The provisions of the Act give him that right. But no attempt to exercise that right was made in the case at bar until after the Board entered its award. Attempted exercise then was too late.

Although the individual employee has all of these remedies at the time the attempted adjustment of his grievance with the carrier has failed, *he cannot pursue more than one to a conclusion. He must make an election.* Brotherhood officials who have handled his claim before officers of the carrier may, in accordance with individual authority previously granted, continue to handle the grievance and either make a settlement or file a claim in court or before the Board. To prosecute the grievance in court or before the Board constitutes an election by the individual in any case where, as in the case at bar, the rules of the Brotherhood authorized the action taken and the employee has done nothing to revoke his individual authorization.

The court at page 19 stated:

> "Rights of conference are not identical with rights of settlement. But the purpose of conference and the duty to treat is to bring about agreement. The right and the obligation to share in the negotiations are relevant to their aim. Conceivably the statute might confer the right to participate in the negotiations, that is, to be heard before any agreement is concluded, either upon the collective agent or upon the aggrieved employee or employees, at the same time conferring upon the other the final voice in determining the terms of the settlement. This is, in effect, the position taken by each of the parties in this case. But they differ concerning where the final say has been vested. Petitioner maintains it has been given to the union. Respondents say it has been left with them."

The majority statement of the Court that "petitioner maintains it has been given to the union", your petitioner assumes, is intended to apply *generally* and *not to the specific facts in the case at bar.* If so intended, your petitioner respectfully represents that the Court's majority opinion does not present correctly the construction of the Act as made by your petitioner, as heretofore stated.

II.

The majority opinion overlooks some of the rules of the Brotherhood granting specific authority to Brotherhood officials to represent respondents in executing the settlement agreement and in filing the second claim before the Board. If all of these rules are considered not to grant such specific authority—collective bargaining is destroyed.

In the petition for a writ of certiorari filed in this Court in this case, your petitioner (p. 5) stated:

> "If the decision of the Circuit Court of Appeals in this case is not reversed, collective bargaining will be destroyed. Railroads will find it impossible to conduct their operations unless they treat directly with their employees regarding matters of grievance, in order to be assured that settlements with the duly authorized representatives of the employees will not be upset by the niceties of the law of agency. Such direct bargaining is demanded by the decision of the Circuit Court of Appeals in this case. The result will be destruction of the policy created by the Railway Labor Act and conflict with the decisions of this Court prohibiting individual dealing with employees as announced in the cases of *The Order of Railroad Telegraphers* v. *Railway Express Agency*, 64 S. Ct. 582 and *J. I. Case Co.* v. *National Labor Relations Board*, 64 S. Ct. 576."

Your petitioner respectfully submits that the majority opinion in this case does destroy collective bargaining. This result ignores one of the principal reasons why Congress passed the Railway Labor Act—*the prompt settlement of grievances.*

In every case where representatives of the carrier "treat" or "confer" with the designated representatives of the employees, whether the subject matter relates to (1) matters of grievance or (2) matters of collective bargaining concerning claims for the payment of money for *past* acts or concerning relief from liability and the abandonment of *past* acts which may form a *precedent or basis* for future money claims, representatives of the carrier will act at their peril in making any adjustment or settlement of any of these claims with the employee representatives.

1. The carrier representatives may ask the designated representatives of the employees for a power of attorney from each employee affected, authorizing the employee representatives to act for them. The power of attorney may not be sufficiently *specific,* as required by the majority opinion of the Court in the case at bar. Even if sufficiently specific to collect amounts *claimed,* it may not be *specific* enough to authorize the particular terms of the *settlement agreed upon,* either before or after the dispute is submitted to the Adjustment Board. Furthermore, such powers of attorney are not "coupled with an interest." They may be revoked at will. Any employee may claim at any time that he revoked his power of attorney before his representatives acted or before they referred the case to the Adjustment Board.

2. The constitution, rules and by-laws of the Brotherhood or union acting as the representative of the employees, no matter how broad or general or clearly expressed, cannot confer upon the employee representatives the

specific powers required by the opinion of the majority in the case at bar.

General Rule No. 3 of the Constitution and General Rules of the Brotherhood of Railroad Trainmen in part provides:

> "... It shall be the duty of each General Grievance Committee carefully to investigate all matters lawfully placed in its hands. It shall have the power to *alter, amend, add to, or strike out, any part or all of any complaint or claim submitted to the committee* ... After the committee has decided on the justness of any claim or complaint, it shall proceed with all effort to adjust the same with the general officers of the road in accordance with General Rule No. 8. ... A general Grievance Committee shall not revise or change a general or system wage schedule or agreement unless authorized to do so by a majority vote of the lodges on the system or by a majority vote of the membership on the system *if such vote is deemed advisable by the general committee,* and it may, when authorized to do so, make and enter into contracts or agreement not inconsistent with the law and policy of the Brotherhood, with the railroad, the employees of which it represents, concerning rates of pay and working conditions." [Emphasis added.]

General Rule No. 5 in part provides:

> "... Should the grievance be sustained, the lodge will then authorize either the local chairman or the local grievance committee to lay the matter before the train master, superintendent, or other proper officer, and use every means to effect a satisfactory settlement, and report his or their action and all things pertaining to the case to the lodge. If the result is not satisfactory, it may be referred to the general grievance committee for further action. *A member of a lodge may withdraw a grievance placed in the hands of a general grievance committee provided such action is taken before said grievance has been presented by the general grievance committee to the officer of the Company, but not thereafter....*" [Emphasis added.]

General Rule No. 7 in part provides that the general grievance committee

> ". . . shall have power to *alter, amend, add to or strike out . . . any part or all of any complaint or claim submitted to the committee,* subject to appeal to the entire General Committee and/*or* Board of Appeals. A general Grievance Committee may authorize their chairman to handle all grievances received from local lodges with the management for *settlement,* . . . " [Emphasis added.]

General Rule No. 8 in part provides:

> "The general grievance committee, as thus constituted shall have all the rights and powers of the full general grievance committee of the system in the consideration of the pending grievance. If the grievance is approved, the committee shall present it to the general officers of the company and use every honorable means to adjust the same; . . ."

General Rule No. 8½ in part provides:

> "Any . . . General Committee . . . closing out cases, *accepting settlements for grievances* referred to them, will within thirty days from date of such action notify the Secretary of the lodge where grievance originated and the member or members filing grievance of such action . . ." [Emphasis added.]

Rule No. 10 in part provides:

> "Whatever action may be taken by the General Grievance Committee . . . shall be law to the Lodges on that road until *and unless reversed by the* Board of Appeals, and if any member refuses to vote or abide by the action of such General Grievance Committee . . . he shall be expelled from the Brotherhood for violation of obligation. . . ." [Emphasis not added.]

Article 25 of the labor agreement or schedule between the petitioner and the respondents provides:

> "Any controversy arising as to the application of the rules herein agreed upon to the Schedule shall

be taken up by the *local committee* and the *local officials*. In the event of failure on their part to agree upon a *satisfactory basis of settlement*, the General Committee may take up the question with the General Superintendent, and in the event of their *failure to agree upon a satisfactory settlement*, the Committee may appeal to the Vice President." [Emphasis added.]

In addition, respondents admit (R. 48):

"... your plaintiffs were informed that the officials of the B. of R. T. were unable to persuade the Company to agree to abide by Article 6. Said *officials of the B. of R. T. were then authorized to file a complaint with the National Railroad Adjustment Board* to enforce the terms thereof and compel the Defendant to perform thereunder.

"That the Company also refused to enter a stipulation of facts to be submitted to the National Railroad Adjustment Board, and that therefore, *said officials of members submitted said complaint to said board* 'ex parte' to endeavor to have said Board compel the Company to furnish your Plaintiffs with engines and the work as set forth in Article 6 of the 'schedule'." [Emphasis added.]

Your petitioner contends that the constitution and rules of the Brotherhood, the provisions of Article 25 of its labor agreement with the Brotherhood and the authorization by the respondents to file the claim before the Adjustment Board (No. 3537) to obtain compliance with Article 6 of the labor agreement constituted *"individual" and specific authority* to the grievance committee officials to make the settlement agreement of October 31, 1938 and also to file the second claim (No. 7324) before the Adjustment Board.

The majority opinion of this Court finds such specific authority wanting and that the question of specific authority is a question of fact for the jury. Not even Rule

No. 10 of the Brotherhood, *of which all of the respondents are members,* providing that "whatever action may be taken by the General Grievance Committee . . . shall be law to the Lodges on that road . . . and if any member refuses to vote or abide by the action of such General Grievance Committee . . . he shall be expelled from the Brotherhood for violation of obligation" is considered by the majority opinion to be specific authority to make the settlement agreement of October 31, 1938 or to file the second claim before the Board.

If these general powers granted to the grievance committee are not considered by the majority of this Court to be sufficiently "individual" and specific to authorize the settlement and later the filing of the claim before the Adjustment Board in the case at bar, the carriers cannot rely upon *any* constitution, rules, by-laws or schedule provisions claimed by employee representatives to authorize them to act in *specific cases.*

3. If the carrier representatives require a resolution of each local lodge of the Brotherhood before making an adjustment or settlement with the employee representatives, some employees may not be present at the lodge meeting when the resolution is adopted. Thus, they may successfully contend, in accordance with the majority opinion of the Court in the case at bar, that they are not bound by the provisions of the resolution and the acts of their representatives pursuant thereto in making the *specific* settlement or taking the *specific* action before the Board.

4. The death of a particular employee at any time after he grants specific authority to his designated representative will operate as a revocation of the power of such representative to act for his widow and children, contrary to the decision of *Smith, et al.* v. *Texas & N. O. R. Co.,* 32 F. Supp. 1013, 118 F. 2d 75 (petitioner's brief, p. 26).

5. If the carrier engages in a practice which the carrier admits entitles an employee to a money claim, the carrier may admit that fifty other employees in the same class or craft are likewise so entitled to the payment of a money claim. Such claims cannot be settled or adjusted with the designated representatives of the employees in the absence of *specific and individual* authorization from *each employee* to make the *specific* settlement or adjustment.

Thus, the only methods by which representatives of the carrier may obtain final disposition of an unsettled grievance or claim is (1) either to file a suit for declaratory judgment *before* the grievance or claim is presented to the Adjustment Board for adjudication or (2) "to settle all disputes" *individually* with each employee.

The filing of a suit for a declaratory judgment under such circumstances to settle all disputes "growing out of grievance or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions," Sec. 153 (i), to declare the rights and other legal relations of the petitioner is permitted by the Declaratory Judgments Act (28 USCA 400) and does not contravene the decision of *Washington Terminal Co.* v. *Boswell, et al.*, 124 F. 2d 235, affirmed by an equally divided Court, 319 U. S. 732.

One alternative to escape the lack of finality created by the opinion of the majority in the case at bar drives carriers and employees into courts for adjudication of their grievances, providing the filing of the complaint by the carrier is made *before* the dispute is referred to the Adjustment Board. This procedure is consistent with the legislative history of the Act and its amendments. Neither Congress nor the courts have considered the adjudicatory provisions of the Act to be exclusive. This Court has held in *Moore* v. *Illinois Central Railroad Co.* (312 U. S. 630, petitioner's reply brief, p. 13) that an employee of the car-

rier may omit to file a claim before the Board and file suit in court on his claim or grievance. The principles announced in that case are well settled law. They apply equally to a carrier.

The other alternative is the execution of *individual* settlements with employees.

Either alternative applied to every grievance destroys collective bargaining. Settlement of grievances is its staff of life. If these settlements are required to be made individually, collective bargaining dies.

Your petitioner respectfully submits the majority opinion in the case at bar violates the clearly expressed policy of Congress for "a more effective process of settlement" of grievances. For the convenience of the majority, there is set forth for re-examination in the appendix to this petition the reports of the Senate and House Committees made prior to the adoption of the 1934 amendments to the Act.

The interpretation of that Act by this Court imposing upon representatives of a carrier "the affirmative duty to treat only with the true representative and, hence, the negative duty to treat with no other" (*Virginian Railway Co.* v. *Federation*, 300 U. S. 515-548, petitioner's brief, p. 20) so frequently quoted by the decisions of this Court, now becomes a trap for carrier representatives who in good faith settle disputes or grievances with designated representatives of the employees specifically authorized to act for them by the rules of their Brotherhood, in a manner which prior to the decision of the Court in the case at bar carriers thought was required by the Railway Labor Act. As to grievances or past claims arising in collective bargaining negotiations, the "true representative" may *lack individual authority in every case to make the specific settlement unless rules of the Brotherhoods are considered*

to grant specific authority. Failing settlement, a further surprise is present for such carrier representatives if the claim or grievance is submitted by the employee representatives to the Board for adjudication, and the claim is denied by the Board or by the Board's referee appointed to decide it. Employees may repudiate the adjudication, notwithstanding that the Act says it is "final and binding," claim that they did not give their representatives *individual authority* to file the claim with the Board, and retry the issues in a suit at law, as in the case at bar. *This result was never intended by the Railway Labor Act.*

CONCLUSION.

Rule 3 of the Brotherhood, hereinbefore quoted, is relied upon by respondents and by the majority opinion (pages 6 and 25) to indicate that individual authority was not granted to the Brotherhood. That rule, in part providing that the general grievance committee "shall not revise or change a general or system wage schedule or agreement unless authorized to do so by a majority vote of the lodges on the system or by a majority vote of the membership on the system *if such vote is deemed advisable by the general* [*grievance*] *committee* . . . " [emphasis added] is clearly not applicable to the facts in the case at bar. No revision or change in a wage schedule was being considered. The wage schedule remained as it existed when the dispute arose (except as to subsequent national increases.) The construction of this rule applied to the facts in the case at bar should not present a jury question.

Rule 5 of the Brotherhood, also quoted hereinbefore, in part provides:

> "A member or a lodge may withdraw a grievance placed in the hands of a general grievance committee, provided such action is taken before said grievance has

been presented by the general grievance committee to the officer of the Company, *but not thereafter . . .*". [Emphasis added.]

This rule of the Brotherhod confers specific and general authority to settle such grievances as might arise. Every respondent in the case at bar assented to such authority by becoming a member of the Brotherhood. This is made clear when Rule 5 is construed together with Rules 3, 7, 8, 8½ and 10. The majority opinion admits (page 22) that authority to settle might be so conferred. Furthermore, Rule 10 in part provides that "whatever action may be taken by the General Grievance Committee shall be the law on that road . . . ". This authority assented to by all respondents is authority to file before the Board. The rules disclose "an unequivocal intention to surrender the individual's right to participate in the settlement and to give the union final voice in making it together with exclusive power to represent him before the Board", as required by the majority opinion, page 26. "The employees had finally committed the whole matter of their claims into the union's hands in such a manner as to constitute a surrender of their individual rights to concur in any agreement of settlement", as required by the majority opinion, page 28. Likewise, "respondents had authorized the union to act finally for them", as the majority opinion, page 28, requires. There was no revocation of this authority until after the Board rendered its award. Thus, specific authority to make the settlement and file before the Board is clearly present. No jury question is presented.

Your petitioner respectfully represents that the majority opinion inadvertently misrepresents its construction of the Act relating to the rights of individual employees and their grievances. Some of these issues were not present in the case. For that reason your petitioner took no position

regarding them. Rehearing should be granted to enable your petitioner to state its position.

Your petitioner respectfully represents, also, that Rule 5 and other rules contained in the "Constitution and General Rules of the Brotherhood" were overlooked as misapprehended by the majority. Rehearing should be granted to give effect to these rules upon the issues of this case.

Respectfully submitted,

PAUL R. CONAGHAN,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I, Paul R. Conaghan, counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

PAUL R. CONAGHAN,
Counsel for Petitioner.

APPENDIX.

SENATE

73d Congress) (Report
2d Session) (No. 1065

BOARD TO SETTLE DISPUTES BETWEEN CARRIERS AND THEIR EMPLOYEES

May 10 (calendar day, May 21, 1934)
Ordered to be printed

Mr. Dill, from the Commitee on Interstate Commerce, submitted the following

REPORT

[To accompany S. 3266]

Your committee, to whom was referred Senate bill 3266, has held hearings on the same, made certain amendments thereto and hereby report the bill favorably to the Senate with the recommendation that the bill as amended do pass.

This bill proposes to amend the Railway Labor Act by rewriting it and making several far-reaching and important changes in the operation of the adjustment boards *to settle grievances* and the work of the mediation board.

Congress passed the Railway Labor Act with the joint approval of both the representatives of the railroads and the railway labor organization. They believed it would enable them to *settle their differences* without the element of compulsion.

They have tried this act for nearly 8 years. It has served a most useful purpose and brought about many good results, but both the representatives of the railroads and of the employees agree that it needs improvement. This bill is intended to provide the needed amendments.

The most important change in the bill is the creation of what is termed the "National Adjustment Board." This Board will have four divisions. Each division will have a neutral member, *so that these divisions will be able to make decisions.* The present regional boards have no neutral members and for that reason are often unable to arrive at decisions.

One of the principal weaknesses of the present law in practice has been that regional boards have not been set up in some sections of the country for settlement of the disputes in some of the crafts. Both representatives of the carriers and of the employees agree that the *setting up of boards for the settlement of disputes should be made compulsory, when necessary.* Representatives of the carriers proposed that the setting up of regional boards be made compulsory; representatives of most of the employees insisted that the setting up of the National Board of Adjustment with four divisions be made compulsory.

As introduced in the Senate, Senate bill 3266 provided only for the creation of a National Board. Your committee has amended the bill authorizing the divisions of the National Board of Adjustment to provide for regional boards whenever, in the discretion of any division, it is desirable to create a regional board. The regional boards will be created for temporary periods, but their members are to be chosen in the same manner as the members of the National Board of Adjustment and *their decisions are to be binding and enforceable in the courts in the same manner.*

Your committee believes that this amendment is highly desirable for the satisfactory operation of the law.

The four divisions of the National Adjustment Board are to be independent of one another. *Each division is to adjust the disputes and grievances of a certain group of crafts,* as specified in the bill. It may be subdivided to take testimony, but the entire division makes the decision. Thus, there will be in effect 18 boards for the taking of testimony and 4 to make decisions.

Each division will be composed of an equal number of representatives of the railroads and employees respectively, and each will compensate its representatives. In case of a deadlock, the members of the division may select a neutral member. If they cannot agree, then the National Mediation Board will select the neutral member, and he will be paid by the Government.

The bill also provides for the establishment of regional or system boards of adjustment, if the railroads and the employees desire to set up such boards voluntarily. *The ideal situation would be to have disputes and grievances settled by the men and management on the several properties* without any recourse to adjudication by an outside tribunal. *Some of those advocating this legislation believe the fact that there is a compulsory board to which grievances may be taken will greatly increase the settlement of disputes* by voluntary adjustment boards between the employees and the railroads.

Another extremely important change from the present law which this bill provides is that it prohibits any carrier from providing financial assistance to any union of employees from funds of the carrier. It also prohibits the railroads from interfering in any manner whatsoever with employees joining or refusing to join any organization or union. The bill specifically provides that the choice of representatives of any craft shall be determined by a majority of the employees voting on the question.

This prohibition is not new. Congress has declared it three times; in the present Railway Labor Act, the Bankruptcy Act and the Emergency Transportation Act. But there are no penalties against its violation. This bill provides severe penalties for violation of the law.

Section 4 of this bill abolishes the present Board of Mediation, consisting of 5 members, and establishes a new board called the "National Mediation Board", consisting of 3 members.

The present board has many important accomplishments to its credit. It has had many difficult tasks to perform. Its powers are wholly persuasive. *The fact that under this bill the National Adjustment Board will deal with many grievances* now brought before the Board of Mediation, makes it unnecessary that the new Board shall have such a large membership.

This new and smaller Board will have power to select and appoint employees to act as mediators under the instruction of the Board with the same freedom to delegate its work as the Interstate Commerce Commission now possesses. This board will appoint the neutral members when necessary to obtain decisions of the National Board of Adjustment and is also authorized to set up a neutral committee to determine *what employees shall vote in the elections to determine the representative in any grievance.*

This determination of what employees shall be allowed to vote is one of the most controversial subjects in the settlement of disputes. Your committee amended the bill so that if the Mediation Board found it might arouse antipathy on the part of the carriers or the employees in deciding questions of this kind, it could create a neutral committee to do that work, so its own usefulness of settling disputes that might arise thereafter might not be impaired. [Emphasis added.]

HOUSE OF REPRESENTATIVES

73d Congress) (Report
2d Session) (No. 1944

TO AMEND THE RAILWAY LABOR ACT OF MAY 20, 1926

June 11, 1934.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

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Mr. Crosser of Ohio, from the Committee on Interstate and Foreign Commerce submitted the following

REPORT

(To accompany H. R. 9861)

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 9861) to amend the Railway Labor Act approved May 20, 1926, and to provide for the *prompt disposition of disputes between carriers and their employees,* having considered the same, report thereon with a recommendation that it pass with the following amendments:

Page 8, line 6, after the word "reach" strike out the word "of". Page 22, line 15, after the word "section" insert a period.
After the word "section." change the small "i" to capital "I" in the word "in".

The Committee on Interstate and Foreign Commerce, to whom was referred bill (H. R. 9861) to amend the Railway Labor Act, approved May 20, 1926, and to provide for the *prompt disposition of disputes between carriers and their employees,* and for other purposes, having con-

sidered the same, report favorably thereon to the Hou and recommend that the bill do pass.

Extensive hearings were held on this bill and the viev of railway managements, employees, Federal Coordinato chairman of the United States Board of Mediation, an other interested parties were presented. All agreed th the present Railway Labor Act is in need of amendmen The 21 Standard Railroad Labor Organizations unan mously urge the enactment of this legislation.

The purposes of this bill are:

1. To prohibit any interference with freedom of ass ciation among employees and to prevent the denial of t right of employees to join a labor organization as a co dition precedent to their employment.

2. To provide for the complete independence of ca riers and of employees in regard to self-organization order to carry out the purposes of this act.

3. *To provide for the prompt and orderly settlement all disputes growing out of grievances and out of the i terpretation or application of agreements concerning rat of pay, rules, or working conditions,* so as to avoid an interruption of commerce or of the proper operation any carrier engaged therein.

ANALYSIS OF THE BILL.

(Section 2)

1. *The bill does not introduce any new principles in the existing Railway Labor Act,* but it is designed to amen that act in order to correct the defects which have becom evident as a result of 8 years of experience. *It does n change the methods of conference, mediation, and voluntar arbitration to settle major disputes over wages and wor ing conditions,* which are provided in the Railway Lab Act of 1926, now in effect.

2. It provides that the employees shall be free to join any labor union of their choice and likewise be free to refrain from joining any union if that be their desire and forbids interference by the carriers' officers with the exercise of said rights.

3. While providing that labor unions shall be free from employer influence and control, it does not give preference to any particular union or class of unions.

4. Machinery is provided for the taking of a secret ballot *to enable the Board of Mediation to determine what representatives the employees desire to have negotiate for them with the managements of the carriers in matters affecting their wages and working conditions.*

5. It forbids the use of the carriers' funds to maintain, aid, or control the labor organizations of the employees and specifically prohibits carrier managements from requiring employees to sign "yellow-dog contracts" requiring them to join company unions.

6. The Railway Labor Act of 1926, now in effect, provides that representatives of the employees, for the purpose of collective bargaining, shall be selected without interference, influence, or coercion by railway management, but it does not provide the machinery necessary to determine who are to be such representatives. *These rights of the employees under the present act are denied by railway managements by their disputing the authority of the freely chosen representatives of the employees to represent them.* A considerable number of railway managements maintain company unions, under the control of the officers of the carriers, and pay the salary of the employees' representatives, a practice that is clearly contrary to the purpose of the present Railway Labor Act, but it is difficult to prevent it because the act does not carry specific language

in respect to that matter. This bill is designed to corr
that defect.

(Section 3)

7. *The second major purpose of the bill is to prov*
sufficient and effective means for the settlement of mi
disputes known as "grievances", which develop from
interpretation and/or application of the contracts betw
the labor unions and the carriers, fixing wages and work
conditions. The present Railway Labor Act provides
the establishment of boards of adjustment by agreeme
In many instances, however, the carriers and the employ
have been unable to reach agreements to establish s
boards. Further, the present act provides that when
if such boards are established by agreement, the employ
and the carriers shall be equally represented on the bo

Many thousands of these disputes have been conside
by boards established under the Railway Labor Act;
the boards have been unable to reach a majority decisi
and so the proceedings have been deadlocked. These
adjusted disputes have become so numerous that on seve
occasions the employees have resorted to the issuance
strike ballots and threatened to interrupt interstate c
merce in order to secure an adjustment. This has m
it necessary for the President of the United States
intervene and establish an emergency board to investig
the controversies. This condition should be corrected
the interest of industrial peace and of uninterrupted tra
portation service. *This bill, therefore, provides for*
establishment of a national board of adjustment to wh
these disputes may be submitted if they shall not h
been adjusted in conference between the parties. The p
visions as to the national board of adjustment are
follows:

(a) The board is to consist of equal number of rep
sentatives of the employees and the carriers. The m

bers of the board are to be paid by the parties they represent.

(b) The board is to be divided into four divisions, each functioning independently of one another.

(c) Division 1 is given the authority *to hear and decide* disputes involving train, engine, and yard service employees, such as engineers, firemen, conductors, trainmen, and switchmen.

(d) Division 2 is to *hear and decide* the disputes of the mechanical forces, such as machinists, boiler makers, blacksmiths, electrical workers, sheet-metal workers, carmen, stationary firemen, and oilers, and their apprentices and helpers, respectively.

(e) Division 3 is to *hear and decide* disputes of dispatchers, telegraphers, clerks, freight handlers, express, station, and storehouse employees, maintenance-of-way and section forces, Pullman conductors, maids, and porters, dining-car employees, and other miscellaneous groups.

(f) Division 4 is to *hear and decide* disputes of the employees engaged on the marine equipment, such as masters, mates, pilots, marine engineers, longshoremen, etc.

(g) If any division of the Board should deadlock on a dispute, then the representatives on the Board will endeavor to select a neutral or impartial person, and if they are unable to agree upon the selection of such neutral person, then the United States Board of Mediation will appoint a neutral person. The dispute will then be again considered and a *majority decision reached.*

(h) It is further provided that should the National Board in its discretion, find it advisable to establish subordinate boards in any particular section of the country in order to take care of its work, that may be done.

(i) Finally, the bill gives absolute freedom to the carriers and the employees to establish any other machinery upon which they may voluntarily agree. If such voluntary machinery should be established, then the parties are exempt from the jurisdiction of this National Board.

(j) There is no increase in expense to the Government provided for in this bill. At the present time the United States Board of Mediation maintains a staff of field men to aid the parties in adjusting these disputes when they are not decided by the adjustment boards. That method will no longer be necessary because these boards will now have a neutral person, which will make it possible to break deadlocks and reach decisions.

The committee is confident that this bill strengthens the Railway Labor Act, where it is necessary to do so, and feels sure that if the act is amended as proposed in this bill, it will *provide effective and adequate machinery to adjust controversies between the carrier managements and employees. It will assure employees the right to bargain collectively and will contribute immeasurably to the establishment and maintenance of industrial peace.*

As heretofore stated in this report, all of the standard railroad labor organizations, numbering 21, are supporting the bill and unanimously urge its passage. [Emphasis added.]

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION, PETITIONER

v.

G. W. BURLEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

The United States urges the Court to grant the petition for rehearing in this case because (1) the decision has had and is likely to have extremely serious consequences in imperiling established machinery for the peaceful disposition of grievance cases; (2) the significance of the case was not appreciated by many groups vitally interested, including the Government, and the questions passed upon by the Court were not adequately explored in the arguments submitted by the parties; (3) the statute may be, and we think should be, construed in a manner which will avoid

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the unfortunate effects of the present ruling and at the same time preserve the rights of individuals with which the Court was properly concerned.

1. The immediate effect of the decision was to halt the operations of major Divisions of the National Railroad Adjustment Board, the body established under the Act to handle grievance cases. The carrier members of the Board have refused to hear cases in which the unions did not present individual authorizations or powers of attorney from the employees concerned. That had never been deemed necessary in the past. The unions have since undertaken to secure such authorizations, and a relatively small number of cases have been handled on that basis. A subsequent disagreement as to whether an authorization from every employee is necessary in a test case brought by one but affecting all craft members has closed down the First Division of the Board again. The Secretary of that Division has informed us that new cases are not being filed, that the employees are thoroughly dissatisfied, and that the outlook is for settlement of the disputes through resort to economic strength instead of through the normal peaceful channels. The Third Division, which with the First hears 94 per cent of the Board's cases,[1] has also practically ceased operations. The opinion also would seem to have thrown doubts upon the validity of most of the awards of the

[1] See National Mediation Board, *Ninth Annual Report*, pp. 54–60.

Adjustment Board in the past involving accrued claims, inasmuch as the *Elgin* case itself permits employees to sue independently of a prior adverse decision of the Board in a proceeding by the union brought on their behalf but, as the Court assumed, without *express* authorization.

Even more significantly, the decision impedes the ordinary settlement of disputes between carriers and unions on the property, inasmuch as the carriers see no point to negotiating with a union if the employee involved may disregard any decision which he regards as unsatisfactory.

To some extent these difficulties will be cured if the unions obtain authorizations or powers of attorney from individuals. The organizations will be able to obtain these from many of the men. But inasmuch as most grievance matters were handled through union representatives without regard for special authorizations, the decision does obstruct the customary processes by which this type of labor dispute was resolved. And since many disputes affect all or a large portion of a craft, limitation of the representative's power to negotiate a settlement to those who have authorized it to act on their behalf would be likely to produce a lack of uniformity which is not compatible with harmonious labor relations. Apart from this and perhaps of greater importance, common types of grievance cases involve a great many men, and cannot be regarded as settled

unless all are bound. For example, if the issue relates to whether a man at the head of the list has lost his seniority, the status of every man beneath him is affected. If a power of attorney is required to be obtained from all of these men, final disposition of the controversy might be impossible under the Court's present decision.

These effects may not be limited to the railroad field if the same principles are applied under the National Labor Relations Act, a measure which has frequently been assumed to parallel the Railway Labor Act in many pertinent respects.[3] This would mean that the decision would affect labor relations generally throughout the nation.

2. The number and the contents of the various briefs filed in support of the petition for rehearing demonstrate both that important national interests vitally affected by the Court's decision did not appreciate the significance of the case and that pertinent material and arguments were not brought to the Court's attention.

3. The opinion of the Court holds that the collective representative does not have an exclusive right to handle grievance cases, and that therefore it can only represent individuals in such matters if it has secured authorization as agent from them. In the light of the problems presented in *Steele* v. *Louisville & Nashville R. Co.*,

[3] See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44; *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332; *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342.

323 U. S. 192, and *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, and of the practice of the Adjustment Board and of some of the organizations with respect to individuals' claims, we share the Court's solicitude as to the rights of individuals in grievance cases.[3] We suggest, however, that the cases cited above point the way to one form of protection of individual rights without the impairment of the collective bargaining process which this decision threatens. Furthermore, we are in agreement with the Court's premise that individual employees have a right to present grievances on their own behalf. This accords them further protection, particularly where, as under the Railway Labor Act, such presentation may be made through unions other than the collective representative.[4]

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[3] See the briefs for the United States as *amicus curiae* in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338, and *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192.

[4] In Point V of the brief for the Government as *amicus curiae* in *General Committee* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 338, the position was taken that grievances could be presented by individuals and minority unions. Under the National Labor Relations Act, the National Labor Relations Board has held that grievances may be presented only by individuals, and its position in this respect has been upheld by the Circuit Court of Appeals for the Fifth Circuit. *Matter of Hughes Tool Co.*, 56 N. L. R. B. 981, enforced in this respect in *Hughes Tool Co.* v. *National Labor Relations Board*, 147 F. 2d 69. These divergent conclusions are required by the legislative history of the two Acts, as noted in the Government's brief in the *M-K-T* case at p. 78, note 65.

The Court's conclusion from this premise that an actual grant of authority by the individual to the collective representative must be proved entails the unfortunate consequences to which we have referred. It is the purpose of this memorandum to suggest a less extreme position which to a large extent will reconcile the need for protecting the rights of the individual with the necessities of the bargaining process, irrespective of the precise bounds of the individual employee's right to participate affirmatively. The rule suggested would in itself be to the great advantage of the individual employees in the vast majority of cases.

Our thought in brief is this. In the normal case the collective representative will act on behalf of members of the bargaining unit on grievance matters. The individual employee will customarily be aware that the representative is doing so, either generally or in the particular case, since such matters are doubtless discussed among the employees before complaints are filed with the employer. As long as the collective representative is acting without discrimination against the individual, the failure of the individual to take independent action himself or to deny the representative's right to proceed in his behalf would appear, as matter of fact, to manifest his acquiescence in the conduct of the representative. Thus, in the ordinary case, such as is here pre-

sented, where no repudiation by the employee appears, the employer should be entitled to presume, or assume, that the collective representative has the necessary authority. The individual can assume the right to speak for himself whenever he pleases, prior to a final settlement. And if the representative is not acting "fairly" he would not be bound in any event. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203. On the other hand, in the ordinary case, where none of those factors is present, the employee has the benefit of the collective representation, which in the long run is unquestionably greatly to his advantage.

We think the suggested presumption has a factual foundation. But we do not regard the controlling factor to be whether the acquiescence by the employee would constitute ratification or authorization under strict agency principles. For although Section 2, paragraphs First, Second and Sixth of the Railway Labor Act may not, when read with Section 2, Fourth, and Section 3, First, (i) and (j), be interpretable as giving the collective representative exclusive rights, they certainly support the construction that the carrier is entitled to negotiate on grievance matters with the representatives in the absence of any facts implying the contrary.

Section 2, First, makes it the duty of all carriers to exert every reasonable effort "to settle

all disputes," including those arising out of grievances, in order to avoid interruptions to transportation. Section 2, Second, then provides that "*All* disputes * * * shall be considered, and, if possible, decided, * * * in conference *between representatives* designated and authorized so to confer * * *." The clear implication from these paragraphs is that—at least in the absence of any reason to the contrary in the particular case—all disputes, including those relating to grievances, should be handled through the collective representative.

Section 2, Sixth, removes any doubts as to this. For it provides that:

> In case of a dispute between a carrier or carriers and its or their employees, *arising out of grievances* or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of *the designated representative* or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held. * * * [Italics supplied.]

This paragraph states specifically that the carrier shall confer on grievance matters with the employees' designated representative, and was un-

doubtedly intended to require conferences with the collective representative in the ordinary case without need for further individual power of attorney.[8]

Congress so provided, of course, because it believed that such a mandatory requirement would best effectuate the statutory policy of insuring the disposition of these controversies peacefully and without resort to economic strength. This policy can be harmonized with the provisions in Section 2, Fourth, and 3, First, (j) upon which the Court largely predicated its decision if the employer is entitled to presume that the collective representative, acting in good faith, has the necessary authority unless the contrary appears.

Acceptance of this suggestion would lead, we believe, to reversal of the decision below, since no claim has been made by respondents that the representative was not acting in good faith or that they or any of them ever affirmatively repudiated the action of the representative prior to final settlement with petitioner or final disposition of the case by the Adjustment Board.

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[8] This would not mean that the individual may not, whenever he sees fit, exercise the rights granted by Section 2, Fourth, and Section 3, First (i) and (j), to present his own case independently.

CONCLUSION

For the reasons suggested and because of the public interest in the question and the serious consequences of the Court's decision, it is respectfully requested that the Court grant the petitioner's application for a rehearing.

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Acting Solicitor General.

ROBERT L. STERN,
Special Assistant to the Attorney General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 160

ELGIN-JOLIET AND EASTERN RAILWAY COMPANY, a Corporation,
Petitioner,

v.

G. W. BURLEY, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE MEMORANDUM AND AMICUS CURIAE MEMORANDUM ON BEHALF OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CERTAIN AFFILIATED ORGANIZATIONS

In Support of Petition for Rehearing

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In Support of Petition for Rehearing

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to the provisions of Rule 27 (9) of this Court, the Congress of Industrial Organizations and certain of its affiliated organizations made application to all of the parties to the instant case for written consent to the filing of a memorandum amicus curiae. Counsel for petitioner gave his consent; counsel for respondents have not given their consent. Special reasons for the granting of this motion are contained in the accompanying memorandum.

INTEREST OF PARTIES FILING THIS MEMORANDUM

The Congress of Industrial Organizations and its affiliated organizations seek leave of the Court to file the within memorandum. The issues of law raised by the instant case are of

basic significance to the existence of collective bargaining under federal labor legislation. We believe, for reasons fully stated in the accompanying memorandum, that the decision rendered by this Court in the instant case, as to which petitioner seeks rehearing, has failed to give sufficient weight to certain aspects of the collective bargaining process described below. The decision affects the administration not only of the Railway Labor Act, which is directly involved in the instant proceeding, but also the administration of the National Labor Relations Act. The decision, in important respects, conflicts with conclusions reached by the National Labor Relations Board in its administration of that Act. The Congress of Industrial Organizations is vitally concerned in the administration of both these Acts and in the unhampered practice of collective bargaining under them.

ARGUMENT

I. THE DISPOSITION OF GRIEVANCES IS A PART OF COLLECTIVE BARGAINING

It is the principal purpose of this memorandum to lay before the Court certain considerations concerning the function played by the disposition of grievances in the bargaining relationship protected and shaped by Federal labor legislation. It is our position that the disposition of grievances is an inseparable part of the collective bargaining process. Since the Court's opinion rests substantially on the opposite view *(infra*, pp. 5–6), and since the relationship between grievances and collective bargaining affects the interpretation of statutes which deal with such bargaining, we shall discuss this matter at some length before turning to the terms of the statute involved and its application to the facts of the instant case.

In adopting the majority rule principle embodied in the Railway Labor Act and the National Labor Relations Act, Congress applied principles long accepted in the field of government. The legislative history of both acts shows that the governmental nature of the collective bargaining process was clearly understood by Congress.[1] "There are . . . legislative,

[1] Thus Coordinator of Transportation Eastman, discussing majority rule under the Railway Labor Act, pointed out that it was necessary in any government and that "the labor union is really a form of government." Hearings on S. 3266, 73rd Cong., 2d Sess. (1934), p. 146; also Hearings on H. R. 7650, 73rd Cong., 2d Sess. (1934), pp. 33–34. The

executive, and judicial phases in collective bargaining."[3] The function of the union, as the exclusive collective bargaining agent of the employees under the Acts is, first, to participate as an equal with the employer in the establishment, by agreement, of working conditions *(infra,* p. 7), and, second, to secure the best working conditions for the greatest number of the employees (*infra,* pp. 11–12). In performing these functions, the union's participation in the disposition of day-to-day grievances is as important as is its participation in the negotiation of formal term contracts.

Using the term in its broadest sense, it is the existence of "grievances" which causes employees to form and join unions. Once recognition has been secured from the employer, the union seeks to dispose of as many grievances as possible in the collective contract. But because it is impossible to dispose by contract of all existing grievances, much less grievances which may arise in the future, trade agreements, except in their most primitive forms, always include provisions establishing a grievance procedure.[4]

Sidney and Beatrice Webb, who coined the term "collective bargaining," regularly used the term to cover not only the making of collective agreements but also the interpretation and application of agreements to specific employees, both retroactively and prospectively.[4] The writings of later authorities have been summarized as follows:

> Authorities in the field of labor relations agree that the interpretation and application of a collective bargaining agreement are essential parts of the collective bargain-

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hearings which preceded adoption of the NLRA are to the same effect. Hearings on S. 2926, 73rd Cong., 2d Sess. (1934) Pt. 1, p. 51 (Prof. Robert L. Hale); *idem.* p. 243 (Prof. E. E. Witte); Hearings on S. 1958, 74th Cong., 1st Sess. (1935) Pt. 1, p. 58 (Secretary Perkins); 79th Cong. Record 7571 (1935) Senator Wagner; 79 Cong. Record 9691 (1935) Representative Withrow. Both the Senate and House Committee Reports on the pending NLRA justified majority rule as an application of tested governmental practices. Sen. Report. No. 573, 74th Cong., 1st Sess. (1935), p. 13; H. Rep. No. 1147, 74th Cong., 1st Sess. (1935), p. 21.

[3] Daugherty, Carroll R., "Labor Problems in American Industry" (5th Ed.), p. 450. These three aspects of the bargaining process are fully discussed in Hoxie, "Trade Unionism in the United States," (1920 ed.) pp. 264–265, 266–267, 270–272. The governmental analogy was fully recognized by this Court in *Steele* v. *L. & N. Railroad,* 65 S. Ct. 226, 232.

[4] "Union Agreement Provisions," Bull. No. 686, Bureau of Labor Statistics, U. S. Dept. of Labor (1942), p. 145.

[4] Industrial Democracy (1920 ed.), pp. 179, 183, 194–195, 198–199, 203–204, 234–237.

ing process. "The rules and regulations first set forth in the contract are elaborated and changed" in the day to day application of the agreement, thus evolving "into a body of industrial common law. . . ." [110] The extent to which the substantive terms of the employment relationship are fixed during the negotiation of the initial contract or the negotiation of amendments thereto, rather than through grievance adjustment varies greatly from industry to industry. In industries where there is an attempt to write into the agreement in as detailed and concrete manner as possible rules covering every contingency which the parties conceive might arise during the term of the agreement, a minimum is left to be adjusted under the grievance procedures.[111] In industries where the agreements "set forth the general framework" of the relationship between the employer and the union and "leave the details to be filled in by daily negotiation," [112] virtually

[110] *Golden and Ruttenberg, The Dynamics of Industrial Democracy* (1942) 43. *Daugherty, Labor Problems in American Industry* (rev. ed. 1938) 450, 452, defines collective bargaining as "the process whereby representatives of a union meet with an employer or representatives of an employers' association to fix the terms of employment for a certain period of time. But it includes more than the creation of an agreement. There is more to it than the negotiations lasting a week or so. It involves also the *enforcement* and *interpretation* of the agreement throughout the months of its duration . . . The *interpretation* of the various detailed terms of the employment contract is one of the most important parts of collective bargaining. . . ." See also *How Collective Bargaining Works* (Twentieth Century Fund, 1942) 51, 244, 314, 360, 362, 418, 566, 596, 644, 652, 736, 801, 858.

[111] *Pierson, Collective Bargaining Systems* (1942) 26-30. Although agreements in bituminous coal fall in this category their grievance machinery has been said to establish "an orderly process by which the rights of both parties could be protected, disputed terms could be interpreted with the minimum of friction, and 'continuous bargaining' could 'take place on subjects not specifically covered by the agreement.'" *How Collective Bargaining Works* (Twentieth Century Fund, 1942) 244. Cf. *Rep. United States Coal Commission, Sen. Doc. No. 195*, 68th Cong., 2d Sess. (1925) Pt. III, p. 1345. The agreements entered into by the International Ladies' Garment Workers have been described as "far more detailed and comprehensive than those of other unions." *Christenson, Collective Bargaining in Chicago, 1929–1930* (1933) 326. Yet in a description of the functions of this union, another author states: "In addition to price settlements, the union is called upon by its members to adjust various other complaints and grievances in the shops. A great number of such disputes—concerning unequal distribution of work, discharges, back pay, or wage rates below the minimum scale—are inevitable under the best phrased contracts and with the most cooperative employers. Their settlement constitutes in bulk and in importance the characteristic of the activity of a union as a business organization." *Carsel, A History of the Chicago Ladies' Garment Workers' Union* (1940) 247–248.

[112] *How Collective Bargaining Works* (Twentieth Century Fund, 1942) 644. See also p. 566, "To the large steel companies, . . . collective bargaining revolves mainly about the settlement of grievances." Cf. *Pierson, op. cit. supra* note 88, 12–20.

> all collective bargaining is conducted through grievance adjustments. In either situation the handling of grievances merges indistinguishably into the fixing of conditions of employment. Viewing collective bargaining as industrial self government, in the former industries grievance adjustment performs primarily a judicial function, in the latter, a legislative function. Even if it were possible in the field of employment relations to separate judicial functions from legislative functions,[23] there is no less reason to extend the principles of democratic representative government to the one than to the other.'[24]

In sum, the grievance procedure establishes "precedents" which "develop over a period of years into a body of industrial common law supplementing the basic contract." [25]

The view outlined above has been adopted by the agency charged with administration of the NLRA. In *Matter of Hughes Tool Co.*, 56 NLRB 981, 982, the NLRB expressly found that "any adjustment of a 'grievance' constitutes . . . bargaining respecting a condition of employment." This view, also, was fully understood by Congress when it adopted the NLRA. The Chairman of the Senate Committee of Education and Labor said at the hearings on that Act:

> "It is assumed, of course, the thing in collective bargaining is that the employers and employees are dealing with grievances. . . ." [26]

This Court, however, apparently unaware of both this conclusion of the NLRB, of the understanding of Congress, and of

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[23] "In a general way it may be said that the settlements of grievances and disputes have been of two kinds—interpretative of the awards of the agreements and supplementary or amendatory to them." Sydenstricker, *Collective Bargaining in the Anthracite Coal Industry*, Bureau of Labor Statistics, Bull. No. 191 (U. S. Dep't of Labor, 1916), 82.

[24] Weyand, "Majority Rule in Collective Bargaining," 45 Col. L.R. 556, 589–590. See also Cooke & Murray, "Organized Labor & Production" (1940), p. 193; George W. Taylor, "The Function of Collective Bargaining," in Am. Management Ass'n, Personnel Series No. 81; "Management's Stake in Collective Bargaining" (1944), pp. 11–13; G. Allen Dash, "Bargaining Through the Grievance Procedure," [this title tells its own story] in *idem*, Personnel Series No. 82; "The Collective Bargaining Agreement in Action" (1944), pp. 3–5; Harry Shulman, *ibid.*, pp. 8, 34.

[25] "Settling Plant Grievances," Division of Labor Standards, Bull. No. 60 (U. S. Dep't of Labor, 1943), pp. 37–38.

[26] Hearings, Senate Committee on Education and Labor, 74th Cong., 1st Sess., on S. 1958, Pt. 3, p. 323.

the opinions of students of labor relations quoted above, reached and proceeded upon precisely the opposite conclusion. It rejected the railroad's contention that "the settlement of grievances [is] part of the collective bargaining power, indistinguishable from the making of collective agreements" (Slip-sheet 22). It found a "boundary between collective bargaining and the settlement of grievances" (*idem*). It appears to have approved the Circuit Court decision which modified the NLRB's order in the *Hughes Tool* case, *supra*, which held that "collective bargaining . . . is distinguished from 'grievances' " *(Hughes Tool Co.* v. *NLRB,* 147 F. 2d 69, 72; Slip-sheet 9).

As we shall show further below, the fact that disposition of grievances is part of collective bargaining precludes exclusion of the union from the former process. Before doing so, however, we wish to point out another aspect of the industrial relationship which we believe has been given insufficient weight in the Court's opinion.

II. INDIVIDUAL DISPOSITION OF GRIEVANCES IS INDIVIDUAL BARGAINING

To whatever extent the collective employee representative is excluded from the disposition of employee grievances, to that extent individual bargaining between employer and employee is permitted. Any grievance which is subjected to settlement between the employer and the employee, rather than settlement between the employer and the union, is subjected to a process in which the superior economic power of the employer can play a part. This is true whether the grievance in question is "retrospective" or "prospective" in nature, whether the claimed right is "vested" or "unvested." Even an unadorned claim for wages assertedly due for past work may be improvidently surrendered in whole or in part by an individual in a "settlement" with the employer. Where the collective bargaining agent is excluded there is nothing to prevent the employer from using his superior economic power in its crudest form to secure such settlements. In fact he may take the flat position that any employee who sues him will be discharged, since Federal labor legislation protects employees against discharge for collective action but not for individual action. Even

where such crude tactics are not resorted to,[7] the right to sue his employer to secure, for example, an additional two cents an hour or a promised promotion is not one on which the ordinary employee can place much reliance for the protection of his interests.

It is this very fact which shaped the collective bargaining provisions of our Federal labor legislation. The history of that legislation shows overwhelmingly that it was the intent of Congress to exclude individual bargaining altogether whenever the employees had designated a collective spokesman.

In 1898, this Court gave judicial recognition to the fact that, in the absence of employee organization, "the proprietors lay down the rules and the laborers are practically constrained to obey them." *Holden* v. *Hardy*, 196 U. S. 366, 397. In both the NLRA and the Norris-LaGuardia Act (40 Stat. 70, 29 U. S. C., Sec. 102), the inequality of bargaining power between employer and employee was given express recognition by Congress.[8] It was recognized also by this Court when it sustained the NLRA. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33. As we point out further below (pp. 17–18), this Court held in *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 343, 346, that if individual bargaining were permitted to exist contemporaneously with collective bargaining "what was made collectively could be promptly unmade individually."

III. THE APPLICABLE TERMS OF THE RAILWAY LABOR ACT CONFLICT WITH THE COURT'S INTERPRETATION OF THE ACT.

A. *The Extent to Which Employees and Bargaining Representatives Can Participate in the Disposition of Grievances.*

Both the Railway Labor Act and the NLRA provide that the representative chosen by a majority of the employees shall be the exclusive bargaining representative. As this Court

[7] Where unions are well established, contracts may forbid such discharges by limiting the employer's right to discharge to cases where "just cause" exists. Such clauses are by no means universal, however. Moreover, under the rule applied by the Court in the instant case, a discharge in violation of such a contract might be treated as a retrospective grievance, subject to settlement between the employer and the employee alone.

[8] See also the Senate Committee report on the NLRA, Sen. Rep. No. 573, 74th Cong., 1st Sess., p. 3.

held in the *J. I. Case* and *O.R.T.* cases, *supra*, these provisions exclude individual bargaining during the existence of an exclusive bargaining agency. Section 9 (a) of the NLRA which adopts the majority rule principle is subject to the following proviso:

> That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

There is no corresponding provision in the Railway Labor Act. We agree, however, with the apparent conclusion of this Court in the instant case that that Act should be read as though a similar provision appeared therein (Slipsheet 19).

The question in the instant case is whether grievances, or at any rate, the kind of grievances here involved, can be finally settled by agreement between the employer and the employee representative alone. The Court holds that such *union settlements* are not permitted, that there must be settlement with the employees involved. It leaves open the question whether an *employee settlement* alone is sufficient or whether a *joint settlement* with employee and union is necessary (Slipsheet 20–21). It concedes that if employee settlements are permitted, then, as to most grievances at least, the union must be allowed to express its views (Slipsheet 20–21 and particularly note 35). We submit that the Act requires union settlements, with the right accorded to the employee to present grievances but not to participate in their disposition.

The disposition of grievances by employee settlements is precluded by the fact that such disposition, without consent of the union, whether of retrospective or prospective matters, introduces the very individual bargaining which Congress intended to eliminate *(supra)*. That settlement of grievances is "bargaining" was clearly recognized by the Court when it referred to the "power to bargain concerning grievances, that is, to conclude agreements for their settlements" (Slipsheet 14). But if this "bargaining" is to be conducted between the employer and the employee alone, it will be no more than a mockery. As the Court itself points out (Slipsheet 21, note 35), the "carrier would be free . . . to bargain with each employee for whatever terms its economic power, pitted against his own, might induce him to accept."

Considerations such as the above have apparently caused the Court to realize that, at least as to matters arising in the future, the union must have power to effect a binding settlement. Thus the Court grants that union participation is necessary to give the contract which it has secured "uniform application" (Slipsheet 21, note 35). The theory would appear to be that when the union and the employer reach an agreement as to the meaning of a contract term or as to a matter not covered by the contract, they have to that extent modified or added to the contract.[9]

The Court maintains, however, that while this power to effect changes in the contract exists, the union has no power over "retrospective" grievances (Slipsheet 10, 22). We submit that the distinction thus made between "retrospective" and "prospective" matters is (1) not sufficiently precise for the creation of legal rights, (2) unrelated to the actual practice of collective bargaining, and (3) harmful to the position of the employees in collective bargaining.

(1) The line between "retrospective" and "prospective" rights is not clear. Suppose a contract grants two weeks of vacation to any employee with one year's seniority. Can the union and the employer reduce the term to one week on the day before an employee of one year's standing is to go on his vacation? An employee who is discharged, allegedly in violation of a contract may view his grievance as retrospective; yet, his right to reinstatement may be viewed as prospective.[10]

(2) The attempt to draw a line between collective bargaining on the one hand and grievances on the other on the basis of what is prospective and what is retrospective is further

[9] Once it is recognized that the union and the employer can so modify contracts, any possible constitutional objections to the position here advocated is eliminated. Where the union and the employer enter into a contract for one year, specifying wages at a given rate, the employees have just as "vested" a right, in the constitutional sense, in wages for the balance of the term, as they have in past wages. If the union can constitutionally be given power to divest the one, then it can divest the other. The argument that such a constitutional bar does exist was made at the time the NLRA was passed, and it was eventually rejected by this Court in *J. I. Case Co.* v. *NLRB*, 321 U. S. 332.

[10] The area covered by the term "restrospective" is by no means small. It is apparent from the fact that the Court distinguishes between grievances and collective bargaining that it considers all grievances to be "retrospective." This is probably the case. Grievances normally arise as protests over what the employer has done or failed to do. Whatever rights are violated by his action or failure to act are "retrospective" or "accrued."

weakened by the fact that such a line is entirely foreign to the practice of collective bargaining. Thus the Court is forced to concede that the process of collective bargaining includes the settlement of past disputes (Slipsheet 22). At the same time it concedes that a grievance dispute "may look to the future as well as the past, as it often does" (Slipsheet 22, note 39). It is apparent, therefore, that whenever the employer meets with his employees, with or without their representative, the discussion will be concerned inseparably with both what the Court treats as collective bargaining matters and what it treats as grievance matters.

Without denying that this duality must pervade all bargaining conferences, the Court requires the parties to bear in mind that any agreement reached between the union and the employer can have only prospective effect. They must understand that regardless of any agreement reached by the parties, individual employees may later claim that a contract which has been assigned one meaning by the parties thereto in fact had another meaning. We do not believe that collective bargaining has ever been carried on in such a fashion or that the statutes were intended to require such bargaining.

(3) Finally, the fact that each grievance adjustment is potentially a precedent makes of the rule adopted by the Court a powerful weapon for weakening collective employee action. After the employer has decided several grievances about a particular matter without consulting the union, it is unlikely that the union will be able to achieve a different result. Thus the union may be faced with a *fait accompli* established by the employer while dealing with employees who lack the strength of collective support.

It follows that the employees as a group have an interest in each grievance which can only be protected by their spokesman. This interest exists, no matter how apparently trivial the individual grievance. In the interest of effective protection of the employees as a class, no area may be left open to individual bargaining. It is a fundamental principle of collective bargaining that "the terms of employment must be standardized; . . . that the standardization of a few major terms of employment is not enough; all the conditions, down to the last minute item, must be made uniform. . . . Competition among workers must not enter in at any point, however

small. . . ." Daugherty, Carroll R., "Labor Problems in American Industry" (5th Ed., 1941) pp. 447–448.

Neither may the union's right to participate be limited by the number of employees directly affected by a grievance or the extent to which it requires reconsideration of contract terms. The employees as a group have an interest in each grievance, no matter how trivial the case or how apparently clear the application of the terms of the contract. There is no point at which it can be said that a particular grievance is sterilized of all elements of collective bargaining. The very fact that it has become a case requires the conclusion that an issue exists, the disposition of which must indicate the line of policy along which similar cases will be settled.[11]

Aside from the direct effect of each grievance adjustment on other employees, there is a broader and more fundamental relationship between each employee grievance and the collective bargaining conducted by the employee body as a whole. Collective bargaining, as its name shows, is a process of trading. It aims at reaching an agreement embodying a compromise between what the employer is willing to grant his employees collectively in order to secure their labors and what the employees collectively are willing to accept in exchange for their labors. Just as a merchant, making a sale of several items to a customer, must decide on which prices to yield and which to maintain, so the employees, acting through their representative, must decide which benefits for which employees in the group shall be considered an acceptable basis for agreement. At the same time, every grievance is a part of the sum of demands the employees may make upon the employer. These demands become the subject of negotiations between

[11] The manner in which relatively minor matters can affect the employees at large may be seen in the case of the employee who complains of insufficient lighting on his particular job. Let us assume that this employee finds the lighting unsatisfactory only because he suffers from an unusual optical affliction. An adjustment of this grievance will of necessity involve a determination of the extent to which the employer is willing to make allowances for physical disabilities. It will establish policies concerning the maintenance of working conditions on the job suitable to each employee. It will raise the question also of finding other ways of meeting such problems, such as by transferring handicapped employees to positions to which they are suited. The case of the employee who has a grievance about his personal relationship with his foreman stands on no different footing. Such a matter cannot be settled without creating or qualifying to a policy on plant discipline and the extent and nature of the duties imposed on employees and supervisors.

employer and employees. Each demand granted reduces the ability or likelihood of the employer to grant others. So, when he grants the demand of individual employees, he impairs the ability of the employees as a whole to secure the aims which they deem best suited to the group as a whole. In short, whether the employer's unilateral action takes the clearly illegal form of a unilateral wage increase, or the form of granting an individual grievance, it has the effect of making a decision for the employees which they might not have arrived at.

The effect on the employees' position of unilateral adjustments may not be considered unimportant because in the case of each grievance it is relatively small. When it is a regular practice for an employer to dispose of grievances without consulting the employees' representative, the impairment of the interests of the employees as a whole may become substantial indeed.

It is important to note that the arguments above are not restricted to the situation where the employer uses his superior economic position to force the individual employee to accept less than what the union might have secured him. Collective action is just as effectively disrupted when the employer gives special benefits to individual employees. "The practice and philosophy of collective bargaining looks with suspicion on such individual advantages." *J. I. Case Co.* v. *N.L.R.B.*, 321 U. S. 332, 338. Since, under collective bargaining, "individual advantages or favors will generally in practice go in as a contribution to the collective result" (*id.*, at p. 339), the employees, through their representative, must have the right to decide which advantages to forego and which to adhere to as the price for their collective employment. Employer favoritism to those resorting to individual dealing leads to desertion of the union, while employer pressure on individuals to accept employment on less advantageous terms leads union members to fear displacement.

In sum, collective bargaining "substitutes group action for individual action in negotiating, interpreting and enforcing contracts and agreements." [13] "The only way to prevent this deterioration is to rule out all competition between the indi-

[13] "An Introduction to the Study of Labor Problems." Watkins, Gordon (1922), pp. 332–333.

vidual workers of the group both in the making of the bargain with the employer, and in the subsequent interpretation of it and work under it." [3]

The individual's right can only be confined to the presentation of grievances and the power of the union must embrace their exclusive disposition. Adoption of a rule requiring joint disposition of grievances, by employer, union and employee would not obviate the objections described above. By requiring union consent to any disposition, the standards of the employee group would be better protected than if the union were excluded. But it is easy to see that such an arrangement would have serious complications. Once the employer had persuaded the employee to accept less than what the union deemed satisfactory, the union's position would become impossible to maintain.

In fact, a serious drawback of both the tri-partite disposition and the employee disposition rules is that the individual employee is set against the union and even encouraged to withdraw from it. The decision requires the union to secure from each employee a specific authorization before it can handle his grievance. At the same time it supplies a most powerful inducement to the employee *not* to give such an authorization. If he does empower the union to act for him, he is bound by what the union does, whether good or bad. If he refuses the authorization, he is bound to get the benefit of any favorable settlement secured by the union, and if the union fails he can still sue independently. Many employees may seize such an opportunity to get two bites at the apple.

Another objection to the result reached by the Court herein is that it removes the adjustment of grievances from the requirement laid down by the Railway Labor Act and the NLRA that employers bargain collectively with majority representatives. This follows necessarily from the Court's holding that the disposition of grievances is something apart from collective bargaining. The employer could insist on the presence of all affected employees in every grievance adjustment, *even where the employees had authorized the union to speak for them.* Since such authorizations would create no more than a common law agency, under the Court's theory, the employer's right to ignore them would be unaffected by the Federal Acts.

[3] "Trade Unionism in the United States." Hoxie, R. F. (1922), p. 256.

Moreover, in view of the technicality of the law of agency, the employer would probably be ill-advised if he did not attempt to remove all doubts by exercising his right to ignore the authorizations.

We earnestly urge upon the Court the point already mentioned above (pp. 3–5), that the collective bargaining process has always been viewed by the participants thereto as including the settlement of grievances and, more particularly, that employers and unions have always considered that they had the power to dispose of grievances on a large scale. We call to the attention of the Court the agreement involved in this very case, referred to by the Court in its opinion (Slipsheet 4, note 5), by which the union and the railroad tried to settle all similar claims then existing. We cannot overestimate the serious consequences of making such agreements ineffective. They are commonly made wherever collective bargaining is established. It will be extremely disturbing to employers and employees alike when employers discover that there is no way, short of settlement with each employee, whereby pending disputes and the possibility of future legal actions can be eliminated.

B. *The Terms of the Railway Labor Act*

The Court appears to believe, however, that all of the considerations outlined above must be swept aside because the terms of the Railway Labor Act require the interpretation it has reached. We submit, on the contrary that the terms of the Act, both separately and collectively, support our position. The chief question, in this connection, is whether the Act makes such a basic dichotomy between the two types of "disputes" described in clauses (4) and (5) of the Introduction to Section 2 as to require the conclusion that the Act establishes exclusive representation through the majority choice as to the first type of dispute but not as to the second.

The contention that such a dichotomy is made is refuted at the outset by the terms of Section 2 Second which provides that "*All* disputes [*i.e.*, both kinds as viewed by the Court] between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference *between representatives designated and authorized so to confer*, respectively, by the carrier or carriers and *by the*

employees thereof interested in the dispute." (Italics supplied.) It is apparently the Court's position (Slipsheet 16–17) that the words "representatives designated . . . by the employees" mean the statutory exclusive representative in the case of one kind of "dispute" but that they mean any common law agent in the case of the other type. We submit that a more natural interpretation of the words is to give them the same meaning, regardless of the type of "dispute" involved.

In any case, Section 2 Sixth removes all doubt on this score. It applies only to grievance disputes and provides that in the case of such disputes, "It shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees to confer." Clearly, this language discloses the intention of Congress to have this type of dispute settled through the established practices of collective bargaining.

In sum, up to the point where disputes go before the government agencies created by the Act, the procedure envisaged by the Act is the same. As this Court itself held (Slipsheet 11):

> *The Act treats the two types of dispute alike* in requiring negotiation as the first step toward settlement and therefore in contemplating voluntary action for both at this stage in the sense that agreement is sought and cannot be compelled. To induce agreement, however, the *duty to negotiate* is imposed for both *grievances* and major disputes. (Italics supplied.)

We repeat that we think it unlikely that two different kinds of negotiations are intended at this point.

The Act, of course, does divide disputes into two classes for the purpose of disposition by the Adjustment and Mediation Boards. Grievance disputes go to the former. The division is no more than that which is always made in collective bargaining between those matters which are dealt with in the formal contract and those which are disposed of through the grievance procedure. The Adjustment Board procedure is in fact just that—a grievance procedure. It corresponds closely to the arbitration procedures commonly set up in trade agreements. As is the case with grievance procedures generally, as noted above (pp. 3–5), Adjustment Board decisions do, in fact, "mold and modify railway collective agreements." [14]

[14] "The National Railroad Adjustment Board," Spencer, U. of Chi. Journal of Business, Vol. XI, No. 2, Part 2, May 1938, pp. 30–31.

The Court also relies on certain specific provisions of the Act in reaching its conclusions. It is sufficient to note here that the provisions of Section 3 of the Act concerning proceedings before the Adjustment Board contemplates steps to be taken only by employers and employees. As to the employees, we believe that this means the exclusive bargaining agent, where one has been chosen. Unless it is so construed, unions would have no right to take any steps before the Adjustment Board. This was certainly not contemplated by Congress or anyone interested in the Act. As we show below (pp. 17–18) the decisions of this Court fully support the theory that, where an exclusive bargaining agency exists, the representative chosen is the employees' so far as their relations with the employer are concerned."

With respect to statutory interpretation, one further point may be made. The NLRA, at least, bears internal evidence that Congress considered the presentation of grievances to be a part of collective bargaining. The provision concerning presentation of grievances by individual employees is attached to the very section (9(a)) which guarantees to the majority representative the right to act as the exclusive representative "for the purposes of collective bargaining." If Congress had not considered the presentation of grievances to be a part of the collective bargaining, it would not have included this proviso in the section dealing with collective bargaining. It would have considered that employees had the right to present grievances without the express grant which the proviso contains.

The legislative history of the proviso to Section 9(a) of the NLRA strongly supports, as to that Act at least the interpretation which we here urge. For reasons of space, we respectfully refer the Court to the article from which we have already

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" The phrase, "in person," in Section 3 First (j), relied on by the Court (Slipsheet 18–19), is otherwise explained. Such phrases as "in person, by counsel, or otherwise" are ordinarily used whenever reference is made in a statute to appearances at a hearing. Moreover, it was necessary to use the phrase here to cover the possible case of a railroad owned by one or more individuals. Although rare, such railroads exist. See Finance Docket 14802, *R. J. Fox Purchase*, decided by the Interstate Commerce Commission, April 13, 1945, where the I. C. C. approved the purchase of a railroad from a corporation by an individual who, by virtue of the purchase, in the words of the I. C. C., "has become a carrier."

Section 3 First (p), on which the Court also relies (Slipsheet 19–20) shows only that *after* the exclusive bargaining agent has secured an Adjustment Board decision through proceedings under the Act, may individual employees sue in the Courts on the award made.

quoted for a full description of that history. "Majority Rule in Collective Bargaining," Ruth Weyand, 45 Col. L. R. 556, 584–586.

IV. DECISIONS OF THIS COURT PRECLUDE IMPAIRMENT OF THE COLLECTIVE BARGAINING PROCESS BY PERMITTING INDIVIDUAL SETTLEMENT OF GRIEVANCES.

The landmark decisions of this Court interpreting the collective bargaining provisions of the Railway Labor Act and the NLRA fully support the position we take here. *J. I. Case Co.* v. *NLRB*, 321 U. S. 332; *Order of Railway Telegraphers* v. *Railway Express Agency*, 321 U. S. 342; *Medo Photo Supply Corp.* v. *NLRB*, 321 U. S. 678. In fact, we believe the Court's decision in the instant case departs in important respects from these three decisions.

First, this Court held in the *O. R. T.* case, 321 U. S. at p. 346, that "collective bargaining was not defined by statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." In the instant case, the Court, we believe, has departed from this doctrine by failing to give any weight to the fact that labor unions have always handled the disposition of grievances together with and as a part of their activities as collective bargaining representative (*supra*, pp. 3–5).

Second, this Court squarely held in the *Case* and *O. R. T.* cases that statutory exclusive collective bargaining bars all individual bargaining, since otherwise "what was made collectively could be promptly unmade individually." *O. R. T.* case, 321 U. S. at p. 346. The instant decision is clearly at war with this principle. Individual bargaining on a wholesale scale would be let in by the back door. This is true even as to the employer who does not desire to disrupt union relationships. He is forced to bargain with the individual employee whether he wants to or not. To the hostile employer, the decision clearly supplies a powerful union-smashing weapon. As soon as he has signed a contract, he can start chipping away at it at every possible point and then treat all violations as grievances to be settled individually.

Third, the cases cited firmly establish the theory that when

"the majority . . . collectivizes the employment bargain" (*J. I. Case* decision, 321 U. S. at p. 339) all relationships with the employer with respect to working conditions must be on a collective basis. As stated by this Court in the *Medo* case, 321 U. S. at p. 685, "orderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees themselves. . . ." The Court, we submit, has departed from this principle in holding here that, in a large and important area, the employer may and must deal with the employees directly as though no collective bargaining representative existed.

Another decision of this Court throws light on an additional fallacy in the Court's opinion. In *NLRB* v. *Hearst Publications Inc.*, 322 U. S. 111, this Court stressed the importance of avoiding technical common law concepts in administering such national legislation as the NLRA. Yet here the Court, in holding that each employer must deal with each employee in settling grievances unless the employee has authorized the union to act for him, has held that the existence of such authorization must be determined not in the light of "statutory influences" (Slipsheet 24), but on the basis of "generally accepted or 'common law' rules for the creation of an agency" (Slipsheet 22, note 38). The burden of the opinion in the *Hearst* case is that, as to the scope of the word "employee," there is no such general common law meaning (see, particularly, 322 U. S. at pp. 120–124). We submit that there is no greater "simplicity and uniformity" (322 U. S. at p. 122) in the common law of agency and that the authority of the union to speak for the employees should be determined "with reference to the purpose of the Act and the facts involved in the economic relationship." *Hearst* case, 322 U. S. at p. 129. If this is done, we believe the interpretation which we here urge will be accepted.

V. FINDINGS OF THE NATIONAL LABOR RELATIONS BOARD, INTERPRETING THE NATIONAL LABOR RELATIONS ACT ARE INCONSISTENT WITH THE RESULT REACHED BY THE COURT.

Consistently with the consideration stated above, the NLRB, charged with administration of legislation companion to the Railway Labor Act, has reached the following conclusion as to the proper interpretation of the grievance proviso

to Section 9(a) of the NLRA: Individual employees may present grievances to the employer and appear in behalf of themselves at every stage of the grievance procedure to urge their point of view. The exclusive representative of the employees, if such a representative has been chosen, must be given the opportunity to be present at every stage in the grievance procedure to negotiate with the employer concerning disposition of such grievance. Only if exclusive representative declines to appear, the employer may dispose of the grievance in meetings with the individual employees alone." This Court has held that "upon such questions of law, the experienced judgment of the Board is entitled to great weight." *Medo Photo Supply Corp.* v. *NLRB*, 321 U. S. 678, 682, note 1.

VI. THE DECISION OF THE COURT WOULD NOT GIVE INDIVIDUAL EMPLOYEES ANY PROTECTION AGAINST ACTIONS BY THE MAJORITY REPRESENTATIVE TO WHICH THEY ARE ENTITLED.

The Court bases its decision not only on the terms of the Act but also on what it believes to be the necessity of protecting the individual employee against the union (Slipsheet, 18, 20, 23). If by this the Court means that it must protect the legitimate interests of the minority against the legitimate interests of the majority, we submit that it is clearly departing from the intent expressed by Congress when it adopted majority rule and that it is also departing from its decisions in the *Case* and *O. R. T.* cases, *supra*. Minorities are not deprived of a voice in their own affairs by majority rule. They can express themselves, first, through participating in the choice of representatives, second, by activity as a member of the representative organization, and, third, by presenting grievances to the employer (*infra*, p. 20). But where there is a conflict, it is of the essence of majority rule that the majority rules." If individual employees are given the separate

---

[16] *Matter of Hughes Tool Co.*, 56 NLRB 981; *Matter of United States Automatic Corp.*, 57 NLRB 124.

[17] See the testimony of Joseph B. Eastman at the hearings on the 1934 amendments to the Act (Hearings before the Committee on Interstate and Foreign Commerce on H. R. 7650, 73rd Cong., 2d Sess. (1934) 33–34): "The minority ought to have every opportunity to air their views. As one who has dissented frequently in the past, I am strong for that; but yet I believe in the rule of the majority. Government cannot be subdivided into factions—and the labor union is really a form of government."

right to secure advantages from the employer, a premium is placed on staying out of the union (*supra*, p. 13), the employee gets an individual advantage which this Court has held to be inconsistent with collective bargaining (*supra*, pp. 17–18), and the employees as a group are prevented from securing what they believe to be optimum conditions for the group (*supra*, pp. 11–12).

If, on the other hand, the Court is concerned with protection of employees against actions by representatives which do not in fact seek the greatest good for the greatest number or which deliberately discriminate against minorities among the employees, we submit that it should not attempt to provide that protection by substantially impairing the collective bargaining process. In the first place, no such case is presented here. There is no claim that the union acted improperly in its handling of the grievance involved or that it discriminated against respondents. In the second place, this Court has held that the rights of employee groups may be protected against improper action of employee representatives by other means. *Steele* v. *L. & N. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood*, 323 U. S. 210; *Wallace Corp.* v. *NLRB*, 323 U. S. 248. And the democratic principle of majority rule can be made to work best by strengthening democratic action within the employee group. In the third place, the "protection" secured to employees by permitting them to settle matters individually with the employer *is entirely illusory*. As we believe we have shown, the employee may easily be persuaded to take less than he is entitled to, and, when he gets more, it is only by sacrificing the rights of the group as a whole and, to that extent, his own rights in the long run.

We have referred above to the fact that individual employees have the right to present grievances to the management. The interpretation placed by the NLRB on the grievance proviso to Section 9(a) of the NLRA (*supra*, p. 19) preserves this right and makes it, in effect, the right to present to the management and the union for decision. This right is not by any means "more of shadow than of substance" as suggested by the court (Slipsheet 20). The right to present one's case and to urge its merits upon those with whom the decision rests is a substantial right. But the power to decide must rest somewhere and the statute, we believe, has placed it with the em-

ployer and the bargaining representative. In those cases where an employee and the employee spokesman are not in agreement, it is not unreasonable to insist that the views of the majority shall prevail.

For the reasons stated above we urge that the petition for rehearing be granted and that upon such rehearing the decision of the Court be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1944

No. 160

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,
A CORPORATION,

Petitioner,

vs.

G. W. BURLEY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The undersigned hereby move the court for leave to file a brief as *amici curiae* in the above entitled action, and in connection therewith represent to the court as follows:

The issues involved in this case concern the right of collective bargaining representatives of employees to proceed in the adjustment of disputes involving the interpretation or application of collective bargaining agreements, either in conference with employers or through submission thereof to the National Railroad Adjustment Board.

The undersigned are attorneys for the Railway Labor Executives' Association, an association of the chief executive officers of twenty labor organizations who represent for the purpose of collective bargaining the vast majority

of employees of the railroad companies of the United States, and who are parties to collective bargaining contracts with such companies.

There are now pending numerous cases in which the said labor organizations are involved, relative to the interpretation or application of such agreements, which said cases are either in the conference stage or are now pending before the National Railroad Adjustment Board. The rights of the said organizations to proceed in connection with these cases will be determined in this proceeding without opportunity for hearing to them unless the undersigned are permitted to file a brief and express their views herein as *amici curiae*.

Dated at Toledo, Ohio, this 7th day of October, 1945.

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CLARENCE M. MULHOLLAND,
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BRIEF OF AMICI CURIAE

Statement of the Case

This case arose out of a dispute between the petitioner and certain of its employees regarding the interpretation and application of a collective bargaining agreement executed by the petitioner and a labor union which has been and is the collective bargaining representative of the craft of employees involved. This dispute was presented for adjustment in conference by the regularly selected officials of the union and a settlement appears to have been made. Subsequently, however, further disagreement arose, and the union submitted the case to the National Railroad Adjustment Board. After hearing, that tribunal held that the settlement made in conference was valid and that the claim should be rejected. This suit was then filed by the individual employees seeking recovery under the original claim. No question appears to have

been raised to the effect that the union was not the properly designated collective bargaining representative, or that the officials had acted otherwise than in good faith.

On these facts the court has held that neither the decision of the Adjustment Board nor the settlement reached in conference was binding upon the individuals who brought this action, unless it could be established that they specifically authorized the union to act for them in reference to this dispute. As we understand the opinion of this court, it is predicated on the proposition that a collective bargaining representative of employees *as such* has no right to proceed to settle a claim for compensation made by an individual employee and growing out of an asserted violation of a collective agreement. This right to proceed is conceived of as resting in the individual only, and any authority which the representative may have with regard to it is considered as being derived from the individual by virtue of some specific act of delegation on his part. These conclusions are drawn by the court from the interpretation which it has made of certain provisions of the Railway Labor Act.

The decision of the court in effect outlaws a method which has been successfully followed for a quarter of a century in the adjustment of disputes of the kind under consideration. Thousands of individual cases have been settled during this period and up to the time of the decision in this case, no one had questioned the authority of the employees' representatives to act in this connection. The existence of such authority has always been considered as an integral and essential part of the collective bargaining process as it has developed under federal regulation. We have no hesitancy in saying to the court that we believe that its decision denying the existence of such authority reduces the potency of collective bargaining as an instrumentality of peace in the railroad industry to a lower level

than that prevailing in 1920. We feel that the court should be advised that since the announcement of its decision the National Railroad Adjustment Board has virtually ceased to function. The adjustment of even simple disputes in conference has been materially impeded and complicated ones have been found to present almost insuperable procedural obstacles. This brief is filed with the deep conviction that the whole process of the orderly adjustment of controversies, which is the fruit of railroad labor legislation obtained after long effort on the part of all concerned, is now in serious jeopardy. The potentialities of this case were not fully recognized by us when it was originally before the court. The decision was, we believe, rendered without the court having before it pertinent information which we are now endeavoring to supply.

It is respectfully submitted that the decision contains certain inherent errors to which we wish to direct the court's attention.

In the ensuing discussion we will show, *first*, that any interpretation of the Railway Labor Act which deprives collective bargaining representatives of any authority to act *as such* in the settlement of disputes regarding the interpretation or application of collective agreements and which restricts their powers in this connection to that of mere agents of individual employees acting upon authorization by and at the pleasure of such employees, is at variance with the legislative history of the Act and is not supported by its specific language; and *second*, that such an interpretation of the statute will raise an insuperable barrier to the orderly adjustment of many disputes between carriers and employees, a result which is contrary to the basic purpose of the statute.

ARGUMENT

I. THE LEGISLATIVE HISTORY AND LANGUAGE OF THE RAILWAY LABOR ACT

Summary Statement of Argument.

The legislative history of those provisions of the Railway Labor Act which deal with the adjustment of disputes concerning the interpretation or application of collective agreements begins with the experiences of the United States Railroad Administration in the years 1918-1920. The orders of the Federal Director General of Railroads during that period recognized the right to proceed in relation to such disputes as being vested *exclusively in the collective bargaining representatives of the employees.* The individual was considered as having no such right. This same idea was carried over and incorporated into the provisions of the Transportation Act of 1920. The decision of the court in this case considers that this original condition has been entirely reversed and that the exclusive right to proceed is now vested in the individual. The court has held that the exercise of this right may be delegated to the collective bargaining representative, but that any authority of the latter exists as the result of such delegation only.

There is nothing in the provisions or in the immediate legislative history of the Railway Labor Acts of 1926 or 1934 to establish that either was intended to bring about any such complete reversal of theory on this point.

Experience of United States Railroad Administration.

When the Federal Director General of Railroads first took office in 1918 he found facing him a complicated and potentially dangerous labor sit-

uation. Employee morale was at low ebb.* Unsettled disputes were numerous and serious. Even at this early date it was recognized that these disputes were of two distinct sorts, amenable to different methods of settlement.

The wage problem was the first to receive attention from the Director General. By his order, it was submitted to a commission known as the Railroad Wage Commission, which issued a comprehensive report of its findings on April 30, 1918. The wage changes recommended by this commission were put into effect with some modifications by General Order No. 27 issued by the Director General. This order, together with the supplements thereto issued from time to time constituted the basis of wage rates during the period of Federal control. Wage changes were made after hearings before a board known as the Board of Railroad Wages and Working Conditions.

These processes and orders, however, did not provide a complete solution for all existing railroad labor problems. As one commentator has stated:

> "The presence of the Board of Railroad Wages and Working Conditions afforded convenient and readily accessible machinery before which requests involving proposed changes in wages, hours, and working conditions could be brought. There was still need for machinery before which minor disputes, those arising out of personal grievances or out of the interpretation and application of the provisions of agreements already in effect, and which could not be settled between carriers and the employees themselves, could be brought." (Wolf, "The Railroad Labor Board," page 50.)

In response to this need certain boards were organized known as Railway Boards of Adjustment. The first of these to be established was Railway Board of Adjustment No. 1, formed by agreement, and pursuant to General

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*Annual Report, William G. McAdoo, Director General of Railroads, 1918, page 4.

Order No. 13 of the Director General. This Board was formed according to the now familiar plan of organization of such boards. It had a bi-partisan membership, composed of representatives of carriers and employees in equal numbers. The Memorandum of Agreement by which it was established contained the following provisions:

> "It is understood, That all controversies growing out of the interpretation or application of the provisions of the wage schedule or agreements which are not promptly adjusted by the officials and the employees on any one of the railroads operated by the Government shall be disposed of in the following manner:
>
> "1. There shall be at once created a commission, to be known as Railway Board of Adjustment No. 1, to consist of eight members, four to be selected by the said regional directors and compensated by the railroads, and one each by the chief executive officer of each of the four organizations of employees hereinbefore named and compensated by such organizations.
>
> "8. The broad question of wages and hours will be considered by the Railroad Wage Commission, but matters of controversies arising from interpretations of wage agreements, not including matters passed upon by the Railroad Wage Commission, shall be decided by the Railway Board of Adjustment No. 1, when properly presented to it.
>
> "10. Personal grievances or controversies arising under interpretation of wage agreements, and all other disputes arising between officials of a railroad and its employees, covered by this understanding, *will be handled in their usual manner by general committees of the employees* up to and including the chief operating officer of the railroad (or someone officially designated by him), when, if an agreement is not reached, *the chairman of the general committee of employees may refer the matter to the chief executive officer of the organization concerned,* and if the contention of the employees' committee is ap-

proved by such executive officer, then the chief operating officer of the railroad and the *chief executive officer of the organization concerned* shall refer the matter, with all supporting papers, to the Director of the Division of Labor of the United States Railroad Administration, who will in turn present the case to the Railway Board of Adjustment No. 1, which board shall promptly hear and decide the case, giving due notice to the chief operating officer of the railroad interested and to the chief executive officer of the organization concerned of the time set for hearing.

"11. No matter will be considered by the Railway Board of Adjustment No. 1 unless officially referred to it in the manner herein prescribed.

"12. In hearings before the Railway Board of Adjustment No. 1, in matters properly submitted for its consideration, the railroad shall be represented by such person or persons as may be designated by the chief operating officer, and the employees shall be represented by such person or persons as may be designated by the *chief executive officer of the organization concerned.*" (Emphasis supplied.)

The method of procedure indicated by this agreement is clear. It was intended that any dispute of the character which could be submitted to the Board was to be first handled in conference "by general committees of employees." If no adjustment was reached, it was to be referred by "the general chairman" of the employees' committee to the "chief executive officer of the organization concerned," and if he considered the employees' claim justified, he was empowered to refer it to the Board. Clearly under this procedure the right to proceed was the *exclusive prerogative* of the collective bargaining representative. Any individual interest was considered as being merged in the collective interest and vested in such representative.

Subsequently, two further boards, known as Railway Boards of Adjustment Nos. 2 and 3 were established (having jurisdiction over other classes of employees) under agreements containing provisions similar to those above outlined. (See General Orders Nos. 29 and 53 of the Director General dated May 31, 1918, and November 13, 1918, respectively.)*

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*In 1918 railroad employees had not selected collective bargaining representatives to the extent that they have today. Accordingly, there were then a considerable number of employees not covered by any one of the Boards of Adjustment established, or not represented by any organization for any purpose. In its Circular No. 3, the Division of Labor of the United States Railroad Administration made provision for the handling of disputes involving such employees. This circular in paragraphs (c) and (e) thereof, provided:

"(c) When employees are represented by Railway Boards of Adjustment, the procedure as to all controversies within the scope of their duties will be as directed in general orders creating such boards. The fact that certain employees are not represented by Railway Boards of Adjustment will in no manner deprive them of any of the benefits accruing from such boards. An assistant to the Director of the Division of Labor has been appointed, and a staff of representatives has been organized, for the especial purpose of rendering the same service to such employees as though represented by a Railway Board of Adjustment. Boards of adjustment have been created by understanding with the larger organizations of employees for the convenience of handling such matters and to relieve the Director of the Division of Labor of adjusting same. It is not practicable to create Railway Boards of Adjustment, except for the larger organizations of employees."

"(e) Personal grievances or controversies arising under interpretation of wage agreements, and all other disputes arising between officials of a railroad and its employees not represented by Railway Boards of Adjustment, will be handled in the usual manner by the individual, his representative, or by committees of employees, up to and including the chief operating officer of the railroad, or officer designated by him, when, if an agreement is not reached, the chairman of the committee of employees and the officer of the railroad will refer the matter to the Director of the Division of Labor, in the same manner as provided in paragraph (d) of this circular."

Reference is made to this circular at this point solely in order that the court may have before it the full historical background of this period and not because we believe that the circular in question contains anything contrary to the conclusions reached in the text. It will be noted that it applied only to employees not represented by any Board of Adjustment and did not purport to govern the handling of disputes over which such boards had authority. The present controversy involves employees who are represented for the purposes of collective bargaining by a labor organization and the dispute is clearly within the jurisdiction of the First Division of the existing Adjustment Board. Thus the reference to individual handling of disputes contained in paragraph (e) quoted above, is not relevant to the basic issue now before the court.

Transportation Act of 1920.

When the railroads were returned to private management in 1920, it seemed necessary to Congress to provide a successor to the administrative machinery which had operated so successfully to preserve labor peace under Federal control. This was sought to be accomplished by the enactment of Title III of the Transportation Act of that year. This statute provided for three steps in the handling of disputes involving the interpretation or application of agreements.* The first step was through conference. This step was common to all types of disputes, for it was provided in Section 301 of the Act:

> "It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between *representatives* designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the *parties* thereto to the board which under the provisions of this title is authorized to hear and decide such dispute." (Emphasis supplied.)

The next step contemplated by the statute was through reference of the dispute to a board of adjustment. The

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* The line of demarcation between these and other disputes was not maintained with entire rigidity in the statute. The distinction was rather between wage disputes and others. The former were reserved for special handling. The disputes as to rules, working conditions or grievances were to be handled according to the procedure outlined in the text. These terms were evidently used to include disputes regarding the interpretation or application of agreements as well as other so-called "minor" disputes.

creation of such boards was authorized by Section 302 o the Act*, and their powers outlined in Section 303. Whe employees invoked the services of such a board, it was re quired that such invocation be made (1) * * * "upon th application of the chief executive of any carrier or organi zation of employees or subordinate officials whose member are directly interested in the dispute, (2) upon the writte petition signed by not less than 100 unorganized employee or subordinate officials directly interested in the dispute.' (Section 303) *There was no provision in the statute where by any employee could address such a petition to the board*

Referring back for a moment to Section 301, quoted above, and the provision contained therein that dispute could be referred to the board by "parties," it become apparent that the only party to such a dispute on th employees' side must be either a labor organization or group of unorganized employees, 100 or more in number The individual could not be such a party. Sections 301-30 of the Transportation Act, therefore, clearly contemplated collective action as the exclusive means of procedure by which the employees' side of any dispute could be pre sented to an adjustment board.

The third step provided by this statute for the han dling of disputes of the character here under consideration was by reference of the same to the United State Railroad Labor Board, a tribunal which the statute created. This board had original jurisdiction as to wage controversies and a sort of appellate jurisdiction over other disputes where adjustment boards were unable to agree or where

*"Railroad Boards of Labor Adjustment may be established by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof." (Section 302.)

such boards had not been established.* The right to seek relief from this board was limited so far as employees were concerned in the same manner as was that to invoke the services of an adjustment board, *i.e.*, this right could be exercised only by the chief executive of any organization of employees or upon petition of 100 unorganized employees.

The Transportation Act thus followed the same basic pattern in relation to the adjustment of these disputes as that established by the orders of the Director General. The right to proceed was recognized as reposing exclusively in the group and not the individual.

The practice of the parties under the Transportation Act was in accordance with this same pattern. Various regional boards of adjustment were organized by agreements between the train service organizations and the railroads pursuant to the provisions of Section 302. The following excerpt is quoted from the agreement establishing the Southeastern Regional Board of Adjustment:

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*This jurisdiction was conferred by section 307 of the statute, which read as follows:

"The Labor Board shall hear, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions, in respect to which any Adjustment Board certifies to the Labor Board that in its opinion the Adjustment Board has failed or will fail to reach a decision within a reasonable time, or in respect to which the Labor Board determines that any Adjustment Board has so failed or is not using due diligence in its consideration thereof. In case the appropriate Adjustment Board is not organized under the provisions of section 302, the Labor Board, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganizd employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable, and with due diligence decide, any dispute involving grievances, rules, or working conditions which is not decided as provided in section 301 and which such Adjustment Board would be required to receive for hearing and decision under the provisions of section 303.

"That all disputes growing out of personal grievances or out of the interpretation or application of the schedules, agreements or practices now, or hereafter established on the railroads signatory hereto, which cannot be adjusted by direct conference between *representatives of the individual railroad and its respective employees,* shall be disposed of in the following manner:

"There shall be created as soon as practicable a Railroad Board of Adjustment to be known as 'Train Service Board of Adjustment for the Southeastern Region' (hereinafter referred to as the Board), to consist of eight members; four to be selected by the said railroads, and one each by the chief executive officer of each of the four organizations of employees, hereinbefore named.

"Disputes arising between a railroad and its employees covered by this agreement will be handled in their usual manner *by general committees of the employees* up to and including the chief operating officer of the railroad (or someone officially designated by him), when if an agreement is not reached, *the chairman of the general committee of employees may refer the matter to the chief executive officer of the organization concerned,* and if the contention of the employees' committee is approved by such executive officer, then the chief operating officer of the railroad and the *chief executive officer of the organization concerned* shall refer the matter, with all supporting papers, to the Board, which Board shall promptly hear and decide the case, giving due notice to the chief operating officer of the railroad interested and *to the chief executive officer of the organization concerned,* of the time set for hearing.

"In the event that either party to a dispute declines to become a party to a joint submission, as above provided, then either party may refer the dispute to the Board under such regulations as the Board may prescribe.

> "*On a written petition signed by not less than one hundred unorganized employees* of the classes covered by this agreement, directly interested in the dispute, the Board shall hear and decide any dispute covered by this agreement; provided, that no dispute over an interpretation of an existing agreement, rule or practice which has been agreed to or accepted by the management and *the duly constituted committee representing the employees* parties thereto, shall be considered as a dispute under this agreement." (Emphasis supplied.)*

This agreement recognized the collective and not the individual right as being paramount in the handling of all disputes of this nature.

The above material brings our discussion up to the year 1926, when the original Railway Labor Act was adopted. We submit that at that time, the right to present a dispute involving the interpretation or application of a collective bargaining agreement to conference or to an adjustment board or the United States Railroad Labor Board rested exclusively in the collective representative of organized employees, and in groups where employees were not organized. The individual as such was given no part in the statutory procedure. This court has held in this case that under the present law the situation is exactly the opposite, that the basic right is now the individual's, and that the collective representative must act, if at all, only on his direct authorization. If such a complete reversal of prin-

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* The full text of the above agreement and others establishing similar regional boards of adjustment under the Transportation Act may be found at pages 39-48, inc. of the Appendix of a document entitled "Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board and Historical Background and Growth of Machinery set up for the Handling of Railroad Labor Disputes, 1888-1940." This document was privately published in book form and copies were given to the court in the course of the proceedings in the case of Washington Terminal Company vs. Boswell (No. 28, October Term, 1942) and are doubtless available to the court as part of the record in that case.

ciple has been accomplished it would be natural to expect that fact to be evidenced by clear and unequivocal language in subsequent acts. It is further submitted, however, that an examination of those acts reveals no such language.

Railway Labor Act of 1926. Much has been written in regard to the failures of the Transportation Act of 1920 and but little as to its successes. The statute was indeed shown to have many weaknesses. The United States Railroad Labor Board had a power to decide but not to enforce its decisions. It could thus rouse the antagonism of losing parties by ruling against them but could not overcome that antagonism if they chose not to comply. It could and did establish principles to govern the selection of employee representatives in such manner that they should truly represent employees and be free from the domination of the carriers, but was powerless to prevent the development of company-controlled unions. It was unable to prevent strikes.

The Railway Labor Act of 1926 has been referred to as a "fresh start" in the field of railroad labor legislation. This is entirely correct if we consider only the deficiencies in the Transportation Act above outlined. It is true that the Railway Labor Act cured the anomaly of "unenforceable decisions" by limiting the authority of the newly created Board of Mediation in such manner that it could not decide controversies at all. The company union evil was attacked by definite provisions to the effect that employee representatives were to be selected without interference, influence or coercion by the employer. Cooling off periods were provided in case of threatened strikes, with mediation or investigation by Presidential emergency boards as remedial devices to assist in settling them.

It is not correct, however, to consider the Railway Labor Act of 1926 as a complete break with the immediate

past. The fact is that it borrowed heavily from the Transportation Act wherever that statute had proven itself successful. This was done particularly with respect to those sections of the Act dealing with conferences and adjustment boards which were already established as satisfactory methods of settling disputes regarding the interpretation or application of agreements. These matters were handled in Sections 2 and 3 of the 1926 Act.

Section 2 First and Second provided as follows:

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.
>
> "Second. All disputes between a carrier and its employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carriers and by the employees thereof interested in the dispute."

These two provisions are paraphrases or verbatim reenactments of the provisions of Section 301 of the Transportation Act.

Section 2 Fourth provided that:

> "In the case of a dispute between a carrier and its employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held."

This provision was new. It is to be noted that it reinforced the provisions of Section 2 Second by imposing a specific duty to confer regarding disputes of the types here under consideration, and that *this duty was imposed upon the collective bargaining representatives.*

Certainly, therefore, there is no provision in Section 2 of the 1926 Act which can be relied upon as bringing about such a complete reversal of precedent as to deprive the representative of his preexisting right to proceed to the adjustment of disputes involving interpretation or application of agreements.

Section 3 of the Railway Labor Act of 1926 provided for the establishment of adjustment boards. As under Section 302 of the Transportation Act, their formation was permissive rather than mandatory, but the new section went much further than the old in prescribing the membership, jurisdiction and procedure of such boards if and when formed. Paragraph First (c) of this Section provided as follows:

> "Boards of adjustment shall be created by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employees.
>
> "The agreement—
>
> (c) Shall provide that disputes between an employee or group of employees and a carrier, growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, that the dispute shall be referred to the designated adjustment board by the parties, or by either party, with a full statement of the facts and all supporting data bearing upon the dispute."

It will be noted that this statute, in prescribing the terms of future agreements, borrowed freely from past agreements establishing adjustment boards, notably from the agreement establishing Railway Board of Adjustment No. 1, and the Southeastern Regional Board of Adjustment, both of which agreements are quoted above. In all fairness it should be noted that certain changes were made. The statute referred to disputes "between *an employee* or group of employees and a carrier." This was the first reference to an employee in the singular. Furthermore, the earlier agreements had contained a provision to the effect that disputes could be referred to adjustment boards if not settled in conference "between representatives of the individual railroad and its respective employees." While this provision was not repeated in Section 3 of the Railway Labor Act, it was incorporated in Section 2 Fourth as above noted. Also the agreements from which we have quoted above establishing various adjustment boards contained provisions to the effect that disputes "will be handled in the usual manner *by general committees of the employees* up to and including the chief operating officer of the railroad." We find that the phrase above italicized was omitted from the 1926 Act. This omission, however, is not significant. The statute's provision that such cases were to be handled "in the usual manner" certainly indicated an intent that the existing practice in this regard was not to be disturbed. That practice was that cases were handled by the organizations which acted as collective bargaining representatives of the employees.

In addition to those provisions noted above which tied in with those of the Transportation Act, or those of agreements establishing earlier adjustment boards, the Railway Labor Act of 1926 incorporated into the law some entirely new provisions whose significance should be noted. The provisions to which we refer were contained in Paragraph

3 First (d) which stated that any agreement establishin an adjustment board:

> "Shall provide that the parties may be hear either in person, by counsel, or by other represent tive, as they may respectively elect, and that ad justment boards shall hear and, if possible, decid promptly all disputes referred to them as provide in paragraph (c). Adjustment boards shall give du notice of all hearings to the employee or employee and the carrier or carriers involved in the dispute.

It has been argued that the provision of this para graph to the effect that "parties" may be heard "in pe son" indicates that individuals may be parties since, is contended, only individuals may appear in person. I interpreting the language used, however, it must be kep in mind that the entire Section 3 of the 1926 Act referre to the prescribed terms of *agreements* establishing adjus ment boards. Thus, when the statute referred to "pa ties," it was obviously referring to the parties to suc agreements and not to the parties to the disputes whic might be submitted to the boards thereby created. Thi is clear from a reference to Paragraph 3 First (h) of th Act, which required that these agreements "shall provid for the portion of expenses to be assumed by the respe tive parties." Obviously the word parties as used in thi paragraph referred to the agencies establishing the board for it cannot be supposed that it was the intention of th Act to provide that the party to each dispute should bea the expenses of the board. It would not be logical to argu that the word as used elsewhere in this same section wa intended to have any different meaning. Thus it appear that the Act must certainly have contemplated that a co lective bargaining representative of employees could be *party* to an adjustment board proceeding in its own righ

Section 3 First (d) above quoted, however, contains the further provision that adjustment boards created thereunder are to give notice of hearings to the "employee or employees and the carrier or carriers involved in the dispute." There has been a great deal of controversy as to the correct interpretation of this language. To anticipate somewhat the chronological course of events, the provision in question was carried over into the Railway Labor Act of 1934 and has been the subject of much discussion by members of the National Railroad Adjustment Board. In general, it may be said that the Board has not interpreted this language as permitting the institution of dispute cases by individuals nor as requiring notice to individuals whose interests are represented before the Board by a collective bargaining representative. Some divisions of the Board have held, however, that where it is made to appear that the interest of some individual employee is adverse to the position taken by the representative, and that such interest arises out of the collective bargaining agreement under consideration (as in cases involving seniority rights), the individual is to be given notice. If he desires, he may then appear in his own behalf in the case. The statutory provision therefore is interpreted by the present Adjustment Board as providing in effect for a right to intervene with notice to the prospective intervenor whose interest is shown to be adverse to the position of the representative. This, we submit, is all that is required in order to give full effect to this language either in the Act of 1934 or that of 1926. We find nothing here which indicates a positive intent on the part of Congress to substitute the individual for the collective bargaining representative as the prime mover in cases before adjustment boards.

To summarize the provisions of the Railway Labor Act of 1926, we conclude that it contains no language which

can be held to have deprived collective bargaining representatives of their pre-existing right to act exclusively in behalf of employees in the adjustment of disputes of this kind. Section 2 First and Second are but paraphrases of an earlier statute which clearly recognizes such an exclusive right. Section 2 Fourth reinforced the right as far as conferences were concerned, but imposed upon the representative a duty to confer. Section 3 contained no language which would justify the conclusion that Congress intended a complete about-face of its former policy. The requirement that disputes be handled "in the usual manner" clearly contemplated a handling by the representative for such was the usual manner of procedure at that time. The reference to "parties" was intended to refer to parties to agreements creating adjustment boards, and these were the carriers, on the one hand, and the collective bargaining representatives on the other. The most that can possibly be said for the Act of 1926 is that it contained provisions for notice of Adjustment Board hearings to individuals "interested" therein. This language has been interpreted as restricted to such an interest as could not be held to be merged in the collective interest of the representative because of its being antagonistic thereto. Hence, we conclude that, while the provision last noticed has been held by some to give limited recognition to individual right in cases involving the interpretation or application of collective agreements, the statute as a whole cannot be construed as establishing such a right in the individual as to enable him to supplant the collective bargaining representative, or to reduce the latter to a mere agent acting, if at all, on individual sufferance.

Railway Labor Act of 1934: When the Railway Labor Act was amended in 1934, it was not the intention of Congress to depart from the principles of the existing statute. The late Honorable Joseph B. Eastman, who sponsored the measure when it was before Congress, made the following statement with regard to the end sought:

> "This Railway Labor Act has now been tried for a period of nearly 8 years. It has served a very useful purpose and has brought about many good results, but experience has shown that it is in need of improvement. The bill before you, S. 3266, proposes such improvements. It does not depart from the general principles of the present Railway Labor Act, but, instead, is designed to reinforce those principles and provide for their more effective application. It seeks not to overturn but to perfect what has been done." (Hearings before Committee on Interstate Commerce, U. S. Senate, 73d Cong., 2d Sess., S. 3266, p. 10.)

A similar thought was expressed in the report of the House of Representatives, approving a similar measure, wherein it was stated that "the bill does not introduce any new principles into the existing Railway Labor Act but it is designed to amend that Act in order to correct the defects which have become evident as a result of 8 years of experience." (House of Representatives Report No. 1944, 73d Cong., 2d Sess., page 2.)

The intent of the framers of the statute not to alter basic legal rights, duties and principles already existing but to provide rather for their more complete effectuation by means of improved enforcement agencies is particularly clear with reference to those features of the 1934 Act which deal with disputes regarding the interpretation and application of agreements.

Section 2, First, Second and Fourth of the Railwa Labor Act of 1926 above referred to were copied verbati into the amended Act of 1934, as Sections 2, First, Secon and Sixth thereof. Obviously if the new statute containe any revolutionary change from the principles of its pred cessors, that change cannot be attributed to these par graphs.

Section 2 Fourth of the 1934 statute was obvious intended to reinforce the provisions of the earlier la regarding the free selection of representatives by em ployees. Only one portion of this paragraph is significa for our purpose, and this reads as follows:

> "Nothing in this Act shall be construed to pr hibit a carrier from permitting an employee, i dividually, or local representatives of employe from conferring with management during workin hours without loss of time."

This language, and particularly the word "individ ally" has been pointed to as constituting a recognition individual rights. It is to be noted, however, that th proviso and indeed the entire paragraph is framed as prohibition against certain discriminatory acts on the pa of the carriers. To permit favored employees to conf with management freely and deny the privilege to othe would be a potent weapon of favoritism and a subtle mea for expressing it. Hence all employees were placed on equal footing in this regard. The legal right conferr was one exercisable as against the carrier and not again or in substitution for the conference rights of the collecti representative. The statute does not limit the conferenc mentioned in Section 2 Fourth to those involving disput regarding the interpretation or application of agreement Thus, if this language is construed as giving to the i dividual a right to confer with management and *there settle disputes* involving the interpretation or applicati

of agreements, there is no reason why the same right is not conferred to deal with management directly as to all disputes, even those regarding wages and terms of employment. As it was certainly not the purpose of Section 2 Fourth to limit the power of collective bargaining representatives as to disputes of this latter character, we do not understand how it can be considered as imposing a limitation upon the power of those representatives with reference to any disputes of any kind.

Section 3 of the amended statute, which deals with adjustment boards, differs in a number of respects from the original Section 3 as contained in the 1926 Act. Boards of Adjustment as created by agreement are still possible. (See Section 3 Second.) In the absence of such an agreement, however, disputes regarding the interpretation or application of agreements are now referable to the National Railroad Adjustment Board. Much of Section 3 First (Paragraphs (a) to (h) inclusive) deals with the organization and membership of the Board. Paragraph (l) deals with the selection and functioning of neutral referees to sit with divisions of the Board in case of a deadlock. Paragraphs (p) and (q) deal with judicial enforcement of awards. Paragraph (k) and Paragraphs (r) to (w), inclusive, refer to administrative details of the Board's operation. All these are new paragraphs whose inclusion was necessitated by the change from boards voluntarily established by agreement to a single board established by statute and having the power to issue decisions enforceable in court. They superseded provisions of Section 3 First of the 1926 Act which had a similar purpose in that they prescribed conditions under which boards of adjustment could be voluntarily established.

When we come to consider those provisions of the Act, however, which regulate the type of disputes to be considered by adjustment boards, the participants in such

disputes, the persons entitled to notice and hearing, and the methods of procedure, there is no substantial change. Section 3 First, Paragraphs (i) and (j) of the new Act are almost exact copies of Section 3 First (c) and (d), respectively, as found in the old. As we have seen, Paragraphs (c) and (d) in the 1926 Act were the only ones which added any element to the law with regard to the handling of disputes growing out of the interpretation or application of agreements which was not already present in the Transportation Act of 1920. Inasmuch as these paragraphs were incorporated into the Act of 1934, in substantially the same form, the conclusion is inescapable that the framers of the amended statute did not intend that any change should be made with regard to the subject matter treated in these paragraphs.

We conclude, therefore, that insofar as this type of disputes is concerned, the 1934 amendments were intended only to substitute a compulsory national adjustment board for local voluntary ones. This change was not intended to alter the basic rights of the parties with regard to the handling of such disputes either before or after they reached the board.

Summary as to Historical Development of Language of the Railway Labor Act. There can be no question but that the present Railway Labor Act contemplates a line of cleavage between disputes involving the making of collective agreements and those involving their interpretation and application. The same line was recognized in predecessor statutes as well as in the administrative scheme of adjustment in effect during the railroad administration, 1918-1920. Different means of handling are and have been established for the two types. It is respectfully submitted, however, that the existence of these differences does not establish any differ-

ence in Congressional purpose as to the rights of collective bargaining representatives in the handling of disputes. This court has held that the making of collective agreements is a matter of collective bargaining wherein the authority of the collective representative is supreme. It has further held, however, that the interpretation and application of such agreements is a matter of individual bargaining where the individual is supreme and the representative has no real authority in its own right. Such a conclusion cannot be drawn merely from the fact of a distinction drawn by the statute. There is nothing inherently unreasonable in concluding that while Congress recognized that there existed two types of disputes so essentially different in nature as to require separate devices for handling them, it still left the collective bargaining representative as the official spokesman for employee interests in both instances. Up to this point in the case, however, the court has rejected this possibility because it has found evidence of a contrary intent in the statute, and for this reason only.

It has been the purpose of this section of the brief to present to the attention of the court facts in connection with the legislative history and language of the Act which, we believe, were not before it at the prior hearing and which it is felt should receive serious consideration. We have shown that the division of disputes into two categories is not a recent development created by the Railway Labor Act for the first time, but that it dates back to the days of the railroad administration. At that time, different means of handling were provided, but in both, the collective bargaining representative not only had a place in its own right, but acted exclusively. No individual right to proceed was recognized. The same division and the same exclusive right of representation were perpetuated in the Transportation Act of 1920. It is apparent, there-

fore, that there is nothing intrinsic in the nature of a dispute involving the interpretation or application of a collective agreement which precludes the granting of exclusive authority to the collective bargaining representative or which is abhorrent to any conclusion that such a result might be intended by Congress. Certainly this was the exact intent of Congress when the Transportation Act was adopted.

If, therefore, we are to find in an act subsequent to the Transportation Act a purpose diametrically opposed to the one there expressed, we should do so only on a clear showing of such a change evidenced by the unequivocal language of such statutes. The present Railway Labor Act clearly contemplates no revolutionary change from the principles underlying the Railway Labor Act of 1926. It is in this last named statute, therefore, that we must find the evidence of such a change, if it is to be found anywhere. In the course of the above argument, we examined the 1926 Act in detail, and failed to find any such evidence. To the contrary that statute showed an intent to perpetuate the administrative agencies and the conference procedures of the earlier Transportation Act as well as an intent to impose the same rights and even greater duties upon collective bargaining representatives. It copied directly the key provisions dealing with the conference method of adjusting disputes. In addition, it made such conferences mandatory and directed its mandate to collective bargaining representatives. It adopted and continued the devices of voluntary adjustment boards. In the statutory provisions establishing the terms of the agreements by which such boards were to be established, there is no evidence of any far-reaching effort to transform the earlier concept of the collective bargaining representative as the party principally responsible for the adjustment of

these disputes or to alter its pre-existing powers with relation to them.

Certain provisions of the Railway Labor Acts of 1926 and 1934 have been pointed to as creating individual rights. Reference is made particularly to provision for notice of adjustment board hearings (contained in Section 3 First (d) of the earlier statute, and Section 3 First (j) of the later statute), and the provision of the 1934 Act regarding the right of the individual to confer with management (Section 2 Fourth). These, however, afford a slender basis for a conclusion that the individual right has been made superior to the collective right. At most, they permit the individual to be heard in his own behalf either in the conference or the adjustment board stage of a dispute. This does not mean, however, that he must be the prime mover in the statutory scheme. A right to confer does not necessarily include a right to adjust in conference. A right to be heard by an adjustment board does not necessarily contemplate a right to initiate cases. *A fortiori* neither justifies a conclusion that the individual right is to be exclusive of the collective bargaining representative. We conclude, therefore, that the role of the individual in such cases is a purely subsidiary one. The statute does not purport to gag him but neither does it attempt to give him rights superior to those of his collective bargaining representative. This, we submit, is the conclusion to which a further consideration of the legislative history and language of these statutes should lead this court.

II. THE UNDERLYING PURPOSE OF THE RAILWAY LABOR ACT WILL BE DEFEATED BY DENYING TO THE COLLECTIVE REPRESENTATIVE, AS SUCH, A RIGHT TO PROCEED IN THESE DISPUTES.

The underlying purpose of the Railway Labor Act is the protection of the public from the damaging effect of labor disputes between carriers and employees. As a means of accomplishing this end, the statute establishes a system of collective bargaining through representatives freely chosen. This system is intended to bring about voluntary settlements of disputes at issue, but in the event that efforts in this direction are not successful, various administrative devices are provided to supplement them.

It is clearly not the purpose of this statute to act in the interests solely of individual employees or of collective bargaining representatives. Any conferring of rights upon or denying them to either was done for the purpose of benefiting the general public. It may be reasonably presumed, therefore, that it was the intent of Congress that individual rights should be merged into collective rights wherever reasonably required as a means of securing the orderly adjustment of disputes.

In this section of the brief, we wish to point out to the court the characteristics of disputes regarding the interpretation and application of collective agreements, the complications which arise therefrom, and the existence of practical difficulties which often make individual adjustment of them impossible and render essential the interposition of collective bargaining representatives if a peaceful settlement is to be reached.

In endeavoring to envision the nature of disputes of this character, it would be easy to conclude that they usually involve a single employee or group of employees

whose number is so small as to be easily determinable. If this were indeed the fact, it might be reasonably felt that under such circumstances, the rights of individuals should be held to be paramount, that the services of the collective bargaining representative as such were not strictly necessary, and that such representative should be required to secure specific authorizations from the individual employees before being permitted to proceed. While some disputes do involve definite claims in behalf of one or very few employees, others are broader in scope, involve the rights of workers whose very identity is unknown at the outset, and raise issues which are important to the whole craft of employees. The requirement of specific authorizations under such circumstances will, we believe, render the peaceful settlement of many such disputes impossible and force the parties either into numerous and complicated legal actions or what is more probable, to a direct resort to their economic strength.

Collective bargaining agreements between carriers and the various crafts of their employees are complicated documents containing numerous rules which are in themselves equally complicated. "Scope" rules are universally included. These map out the types of work the performance of which is recognized as being the prerogative of the members of the craft. "Seniority" rules are also universal. These provide that the available work of the type performed by the craft is to be apportioned among its members in order of their seniority. The work of most crafts, however, varies from position to position, some requiring a higher degree of skill than others. Thus it is provided that an employee must not only have sufficient seniority to obtain and hold a desirable position but he must be qualified to perform the services incident to it. These are the "qualification" rules.

Disputes regarding the application of these rules are frequent. Let us consider a rather simple case where a carrier has assigned services covered by the scope rule of its agreement with one craft to a member of another craft. Under such circumstances, it is apparent that some one employee of the first craft was entitled to perform work but was denied that opportunity. The question is "Which one?" In any department of a railroad the number of employees in active service and the number on furlough varies from day to day. Under the facts stated, the senior furloughed employee in the craft whose agreement has been violated should have been in active service during each day of the period of violation. This, however, would not be the same individual during the whole period. It might well be that dozens of employees would occupy the position of No. 1 man on the furloughed list during this time and each would have a claim growing out of this one violation. The situation is complicated by the fact that the senior furloughed man on any given day might not be qualified to perform the duties in question and hence would have no valid claim, while the No. 2 man might be qualified. This fact must be considered. It might also be that the duties wrongfully assigned to the outside employee would actually have been performed by qualified workers of the craft whose agreement was violated and who were actually in service during the whole period, but performing less desirable jobs. These individuals, too, have claims. They in turn may well have displaced others junior in seniority to themselves who were as a result out of work entirely. Accordingly, it is entirely possible that the ramifications of a single simple violation of a collective bargaining agreement may be such that over a period of months substantially every employee in a large shop, office or station will have been adversely affected. The unions keep no employment record such as would inform them of either the

identity of the various claimants or the extent of their claims. It is apparent from what has been said above that even by the use of the complete employment records of the carrier, it would in many instances be difficult or impossible to determine with any real accuracy who had been damaged by the violation. If any practicable basis of settlement is to be reached in such a case, it would have to be by some loosely accurate rule-of-thumb method.

Under the decision of the court, the union before settling such a dispute, or submitting it to the Adjustment Board for a binding ruling, would have to secure personal authorization so to do from each individual who might be affected. Even if it were possible to determine who these individuals were, it is proverbially difficult to induce some people to sign any document which might affect their legal rights, however innocent the document may appear in the eyes of the lawyer. Accordingly, the securing of a 100 per cent authorization in a case such as our hypothetical example would be a tedious and sometimes impossible task. Authorizations from a part of the employees would probably prove to be of little value, as corporations against whom are asserted claims involving a number of persons are notoriously reluctant to settle them unless all persons interested are bound by the settlement. Hence, while a representative could, under the court's decision, settle such a dispute as this one insofar as the discontinuance of the violation in the future was concerned, it would be powerless to exact any penalty for past losses. The individual employes, each uncertain of the extent of his own claim (which is probably small in amount), will likewise be in no position to collect. As a practical matter, therefore, in situations of this kind, a requirement of specific authorizations before the collective representative can act while assuring to the individual a naked procedural right

to press his claim, will effectively deny him any opportunity of securing any recompense for the wrong suffered.

It will permit the carriers to violate their agreements with virtual impunity so long as the violation is such as to lead to such complicated results. More important still, it will probably leave such claims as unsettled disputes and as disturbing elements in the field of railroad labor relations.

The example picked out above for discussion is not an exceptional case. Many situations exist where numerous unidentified and virtually unidentifiable employees have claims arising out of the same dispute. This result follows where a claim is made that a single employee has been given an improper position on a seniority list. Where a man is No. 20 on such a list, for example, when he should properly be No. 150, there are 130 employees who may have suffered losses due to the improper classification of one man. The improper application of an overtime rule may involve numerous individual claims. The standard railway labor organizations have made an agreement with the carriers known as the Washington Job Protection Agreement, which provides for compensation for employees affected by consolidations. Claims under this agreement frequently involve hundreds of individual workers.

The above will, we believe, amply illustrate the difficulties inherent in any effort to adjust even simple appearing disputes if the collective bargaining representative is not to be permitted to proceed in its own right. The individual adjustment of claims arising from such disputes will be well nigh impossible. When the collective bargaining representative may act in its representative capacity, consolidate such claims for adjustment, provide a central agency which can, by agreement with the carrier, separate the genuine from the spurious and bring about a

reasonably just settlement by which the individual recoups his losses and the carrier disposes of all claimants in a single action, we submit that the cause of industrial peace is served.

For a quarter of a century of the recorded history of railroad labor relations, the organizations have performed the above named functions without question of their right so to do.

This period has been one of gradual establishment on the railroads of a system of orderly adjustment of controversies between men and management. That system has produced an era of industrial peace in the industry unparalleled by the experience of any other industry of comparable size. These results have been achieved not only by legislative evolution which has perfected the governing statutes, but by an evolutionary process within the industry itself which has perfected a spirit of cooperation without which no statute of this kind can succeed. This latter evolution has produced a situation where collective bargaining agreements are uniformly accepted as the basis of the rights of labor. By constant efforts on the part of the organizations, a considerable measure of uniformity in such agreements has been obtained. Uniformity in the terms of agreement, however, is of little significance unless accompanied by uniformity of interpretation. This, too, has been secured to a substantial degree by the efforts of the organizations in two ways, first, by insisting that the carriers interpret and apply similar provisions in their agreements in the same manner throughout the industry, and secondly, by discouraging the presentation by the organizations' own members of claims contrary to such interpretations. Neither task has been or is an easy one. Some carriers have been reluctant to concede a uniformity of purpose in various agreements. Many employees have insisted that their individual claims be pressed, however con-

trary they might be to nation-wide standards. In the face of these obstacles, however, uniformity has in large measure been achieved and has proved itself a stabilizing influence in labor relations.

The policing of collective agreements is one of the most vital of the functions heretofore exercised by collective bargaining representatives. An enormous number of claims are presented every day to union officials. The sifting of the meritorious from the baseless is one of their most difficult tasks. Where any individual or group believes himself or itself the victim of injustice, emotions are aroused which are such as to welcome suggestions of conflict rather than councils of moderation or compromise. Heretofore the authority exercised by the organizations has proved a salutary check on this tendency. If that authority is now held to be non-existent we anticipate a flood of disputes such as has never before been experienced. The National Railroad Adjustment Board is already overburdened with cases filed after careful scrutiny by the organizations. This burden must inevitably increase if that scrutiny is to be henceforth unavailing to bring about settlement.

Heretofore this court has held that the remedies provided by the Railway Labor Act are not exclusive, that the disgruntled employee may ignore them and bring action in the courts. (*Moore vs. Illinois Central Railroad Co.*, 312 U. S. 630.) If now the power of the organizations to settle disputes in conference and to submit them to the Adjustment Board is to be subjected to individual control, a field of potential litigation is opened up whose limits are difficult to predict. Such situations are soon recognized by those who anticipate personal gain to themselves from the prosecution of cases, and we may reasonably expect that the courts and not the collective bargaining processes or the administrative agencies of the Railway Labor Act will

soon become the normal mode for the settling of disputes regarding the interpretation and application of collective agreements. This field of law is technical and complicated, and it is inevitable that the courts of 49 jurisdictions will not agree in the results reached. In consequence, individual collective bargaining agreements designed to be applicable uniformly throughout the industry or at the very least throughout individual railroad systems, extending across many states, will have no settled interpretation anywhere beyond the limits of the state where they have been construed in a given manner.

If such results were truly essential to the preservation of vital individual rights, we would not complain. We believe, however, that the individual will in fact suffer substantial loss on his own part. We have pointed out above that many disputes result in claims which may be readily adjusted in the aggregate but are not susceptible to individual adjustment. The increased complications of the new system will bring delays and expenses of litigation, and uncertainty as to rights, which were avoided by the old. The right to proceed which would be thus established in the individual would therefore be an empty one having as little practical value to him as the ephemeral "right of contract" which was once considered to be a legal barrier to the establishment of any system of enforced collective bargaining. No one contends that the individual should be left at the mercy of a representative which might act in a discriminatory or arbitrary manner. This court has granted protection to those whom it considered as having been unjustly treated in other phases of the collective bargaining process (*Steele vs. Louisville and Nashville R. Co.*, 323 U. S. 192; *Tunstall vs. Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210) and similar relief is available to any who might be denied fair representation in the presentation of claims growing out of the interpre-

tation or application of collective bargaining agreement
The substantial rights of the individual may be thus pr
tected by governing the collective bargaining represent
tive in the exercise of its powers. It is not necessary
deny the existence of those powers in order to accompli
that result.

In summary, therefore, we submit that the regulator
scheme of the Railway Labor Act requires for its effecti
operation a recognized authority in the collective bargai
ing representative to proceed in its own right to adju
disputes regarding the interpretation or application
agreements. A denial of that right will produce no re
benefits to individual employees, will impair the effecti
ness of representatives as stabilizing influences in th
field, will deprive the carriers of any agency to which the
may go to secure a final settlement of many vexatious labo
controversies, and will bring about a general deteriorati
of relations between employees and management whi
will necessarily impair the paramount interest of the publi
in uninterrupted transportation.

We respectfully submit that these results already e
perienced or reasonably to be anticipated from the inte
pretation which has been given to the Railway Labor A
are inimical to the whole purpose of the statute and shou
not be maintained.

We recognize that the general purpose of any statu
is not controlling as to its interpretation where the la
guage and legislative history are such as to show that th
purpose was not in fact implemented. In the present cas
however, we have shown in the first section of this bri
that the words and history of this Act also point to a co
trary result. We have shown that the original Congre
sional scheme for the settlement of disputes of this kin
contemplated an exclusive power of adjustment in th
collective bargaining representatives. This scheme,

embodied in the Transportation Act of 1920, is not shown to have been modified in the successor statutes of 1926 and 1934. Any recognition which those later acts may have given to individual rights go only so far as to consider them as subsidiary and subordinate to those of the collective representatives. The right and duty to proceed toward an adjustment through the methods of conference and submission to adjustment boards provided by the Act is still primarily that of the collective bargaining representative.

Inasmuch as the conclusions of the court on the first hearing were contrary to those above expressed, we respectfully submit that the petition for rehearing should be granted, and the case should receive further consideration at the hands of the court.

Mr. Joseph Padway, General Counsel for the American Federation of Labor, has authorized us to state that this brief represents the position of that organization with reference to the issues involved in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

G. W. BURLEY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY TO PETITION FOR REHEARING AND AMICI CURIAE BRIEFS.

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G. W. Burley, et al., respondents, herewith present this reply to the Petition for Rehearing and respectfully show to the Court that there is no basis for granting or considering a Rehearing in the above entitled cause for the following reasons:

I.

The Majority Opinion Does Not Misrepresent Petitioner's Position With Reference to the Rights of Individual Employees Under the Act and Petitioner's Allegation Is a Misrepresentation of Its Position in Reference Thereto.

Nowhere in petitioner's brief, nor in any of the various and sundry briefs filed by *amici curiae,* is there pointed out any misconception of the law or facts by the Court in

its opinion. Nowhere is there shown any conflict with any previous decision of this Court or any other Court by the decision rendered in this case. We, therefore, state that neither the petitioner nor *amici curiae* have made any showing to justify this Court in granting a rehearing or reversing their decision herein.

The opinion of this Court did not inadvertently misrepresent petitioner's position with reference to the rights of employees under the Act. Petitioner took a very definite stand as to these issues.

From an examination of the Petition for Rehearing, it is apparent that either petitioner has not read its own briefs, or is deliberately misrepresenting the facts to this Court, as have certain others, as will be shown later in this brief.

Petitioner takes issue with the Court's statements, on page 16 of the opinion, that:

> "Petitioner urges that, notwithstanding the proviso • • • the effect of the provisions taken as a whole is to make the collective agent the employees' exclusive representative for the settlement of *all* disputes, both major and minor, and of the latter 'whether arising out of the application of such (collective) agreements or otherwise.'"

In support of the Court's observation in the opinion, may we point out on page 5 of petitioner's Petition for Writ of Certiorari, it makes the following statement:

> "Such direct bargaining is demanded by the decision of the Circuit Court of Appeals in this case. The result will be destruction of the policy created by the Railway Labor Act and conflict with the decisions of this Court prohibiting individual dealing with employees as announced in the case of • • •"

Again at page 8 it enunciates:

> "• • • the policy declared by the Railway Labor Act which imposes 'the affirmative duty to treat only

with the true representative and, hence, the negative duty to treat with no other.' "

which, we respectfully submit, was one of the main grounds upon which petitioner sought review.

Again at page 20 of petitioner's brief it states:

"Apart from the administrative difficulties, the mandatory provisions of the Act, as regards the petitioner 'imposes the affirmative duty to treat only with the true representative, and, hence, the negative duty to treat with no other.' "

Also on page 25 of petitioner's brief, it states:

"By the terms of the labor agreement, this power to treat with the Petitioner is given *only* to the General Grievance Committee of the Brotherhood on the Elgin, Joliet and Eastern Railway System, of which C. H. Williams was General Chairman and S. F. Johnson was Secretary." (Italics ours.)

In the next paragraph on the same page the petitioner states:

"The compulsory provisions of that Act requiring the defendant 'to settle all disputes,' if possible, with the designated representatives of the Brotherhood culminated in the settlement agreement of October 31, 1938. This was in compliance with the provisions of the labor agreement and of the Act. * * * The claims of the respondents asserted more than two years after the execution of the compromise agreement cannot override the provisions of the labor agreement between the petitioner and the Brotherhood that grievances 'shall be taken up' by the General Committee and *not by the respondents individually.* Nor can they override the duties imposed by the Railway Labor Act upon the petitioner and the respondents' designated representatives 'to settle all disputes.' " (Italics Ours.)

The second paragraph of the Opinion of this Court that petitioner takes issue with is:

" 'Petitioner does not squarely deny that the ag-

> grieved employee may confer with the carrier's local officials either personally or through *local* union representatives in accordance with the proviso to Section 2 Fourth. But this right, if it exists, is regarded apparently as at most one to be heard, since in petitioner's view the power to make settlement by agreement is vested exclusively in the collective agent. Cf. §§ 2 Sixth and 3 First (i).' "

On page 7 of petitioner's Reply Brief for Petitioner, the petitioner states, in reference to the power of the Union Representative:

> "The Act gave the designated representative the power to 'refer' this claim before the Board, if he so elected. The fact that such a claim may affect the 'personal' or 'individual' rights of the respondents is immaterial. Congress intended that disputes involving these rights may be referred by the designated representative to the Board for adjudication. If specific authority of the designated representative is necessary from each employee relating to matters affecting the 'personal' or 'individual' rights of each employee, designated representatives will be stymied in carrying out their statutory duties."

Here, clearly, the Court's statement is brought out that petitioner makes in its discussion between personal or individual rights of respondents or general grievances, and on page 25 of petitioner's Brief, which we have heretofore quoted, it says that only the General Grievance Committee has the power to take up or settle grievances with the General Superintendent or the Vice President of the Railroad.

Again on page 6 of the Reply Brief for Petitioner it states:

> "Designated representatives of the employees have power to change the labor agreement. The Act so provides. Designated representatives also have power to compromise grievances. That power to make the

compromise agreement of October 31, 1938, effective is derived from the provisions of the Act authorizing representatives 'to settle all disputes' and 'with all expedition.'"

Further on on the same page petitioner states, referring to C. H. Williams, as Chairman of the General Grievance Committee:

> "* * * was the designated representative of the respondents. *He alone* is the official of the Brotherhood authorized to file claims before the Adjustment Board." (Italics Ours.)

Again at the bottom of page 7, we have heretofore quoted this provision, hence now only refer to it.

On page 2 of the Petition, petitioner states that the employee representative has power to settle personal injury claims of employees, yet, at the bottom of page 7 of its Reply Brief, as heretofore quoted, it makes a statement diametrically opposed to that position.

On page 4 of the Petition for Rehearing, in the last paragraph, it admits that any employee individually may "confer" with it during working hours, etc., and states:

> "This has always been the practice of your petitioner, notwithstanding its recognition of the Brotherhood as the designated representative of the employees. Furthermore, an *individual* employee of your petitioner, whether or not he is a member of the Brotherhood, 'either personally or through *local* union representatives' may 'confer' with local representatives of your petitioner * * *"

Evidently petitioner now has been converted, for in its Brief for Petitioner, at page 20, the second paragraph thereof, its previous position was:

> "the mandatory provisions of the Act, as regards the petitioner 'imposes the affirmative duty to treat only with the true representative, and, hence, the negative duty to treat with no other.' (*Virginian Railway Co.* v. *Federation,* 300 U. S. 515, 548.)"

Again at page 24 it had previously said:

"and that all 'disputes between a carrier or carrie and its or their employees shall be considered, and, possible, decided, with all expedition, in conference the representatives designated and authorized so confer. * * *' "

and at the top of page 25 they professed:

"Thus treating with the designated representativ is required by the collective bargaining agreement well as by the Railway Labor Act."

and in the third paragraph of that page they furth stated:

"The compulsory provisions of that Act requiri the defendant 'to settle all disputes,' if possible, wi the designated representatives of the Brotherhood cu minated in the settlement. * * *"

Further on they stated:

"The claims of the respondents asserted more th two years after the execution of the compromise agre ment cannot override the provisions of the lab agreement between the petitioner and the Brotherho that grievances 'shall be taken up' by the Gener Committee and *not by the respondents individuall* Nor can they override the duties imposed by the Ra way Labor Act upon the petitioner and the respon ents' designated representatives 'to settle all di putes!' " (Italics Ours.)

On page 5 of the Petition for Rehearing, at the botto of the page, they now state:

"Obviously, the Brotherhood is not the '*exclusi* representative' of an individual employee *seeking enforce his grievance after* settlement with the ca rier has failed. The individual employee need not r fer his grievance to the Adjustment Board for a judication."

Petitioner hereby, we believe, makes a contradicto statement. The whole tenor of its previous statements w

to the effect that once the Brotherhood officials have taken an employee's case they have the exclusive right to handle it as far as they desire without control or initiative or question by the employee. Yet, in the above quoted paragraph, petitioner admits that the individual need not submit his grievance to the Adjustment Board for adjudication, which, we submit, is the gist of our case, it being respondents' position that, (1) they had no knowledge, (2) no authority was given for filing of individual claims, (3) how could they be in a position to retract authority they had never given?

At the top of page 6 petitioner quotes its Brief and says:

> "'They could have directed their designated representatives to file a complaint in court and, thereby, obtain judicial determination of their claims.'"

We respectfully submit that we believe this is a classical example of the whole tenor of petitioner's and intervening *amici curias'* attempt to overthrow all of the hundreds of years of precedent in the law, and procedure. They would have us disregard everything that we have sought to build up for the safeguard of human rights to seek their ends. Since when do the designated representatives, of whom they speak of as being Officials, have a right to practice law in Courts and file complaints in Court and, "thereby, obtain judicial determination of their (individual) claims"?

Petitioner has the effrontery to seek affirmation of its position by further stating, on page 6 of its Petition for Rehearing:

> "As pointed out in petitioner's reply brief, p. 13, 'court adjudication is always available to designated representatives *or employees* before they *elect* to file a claim before the Adjustment Board' (emphasis added), in accordance with the decision of this Court

> in *Moore* v. *Illinois Central Railroad Company*, 312 U. S. 630. In that case this Court held that after endeavoring to settle a grievance with representatives of the carrier, an individual employee is not required to refer his claim to the union for enforcement or to the Adjustment Board for adjudication. He may elect to file in court a claim for his grievance and disregard the adjudicatory processes of the Board and the representatives of the union."

We fail to find anywhere in the case cited where the Court gives the "representative" the authority to file suit in any Court, for or on behalf of its members.

We believe we have sufficiently pointed out the nugacity of the Petition for Rehearing concerning these points. The whole tone throughout the Petition for Rehearing, Brief and Reply Brief is to completely black-out the individual rights of the respondents herein.

Petitioner, at page 6, again refers to undisputed facts in the case at bar, and states that its arguments were not intended to apply to cases of individual employees who had revoked the authority given to their representatives and who were individually seeking remedies for their grievances. We reiterate, how could respondents revoke authority that had never been given? The only authority of the representative is set out in the rules and regulations of the Constitution of the Brotherhood of Railroad Trainmen, Articles 6 and 7 thereof.

On page 7, it would seek to have this Court believe that, by being members of the Brotherhood, they "specifically" and "individually" authorized an affirmative course of conduct on behalf of the Brotherhood officials for their benefit. We again take issue with petitioner on the facts. Rule 6 of the Constitution of the Brotherhood provides for the presentation of the grievance to the Local Lodge. Rule 7 provides:

> "When the local chairman or grievance committee

> fails satisfactorily to adjust any grievance referred to it, as provided in the foregoing rules, and if the lodge so orders it, the secretary of the lodge shall immediately send a certified copy of the grievance to the chairman of the general grievance committee, and a duplicate copy of the grievance to the President of the Brotherhood. It shall be the duty of the chairman of the general grievance committee, on receipt of a certified copy of grievance, to appoint a time for the consideration of the grievance, and to summon the secretary of the general grievance committee, and the chairman of the local grievance committee of the lodge where the grievance exists, to meet with him at an appointed time. * * * A committee thus constituted shall have power to alter, amend, add to or strike out or with the approval of the President refer to the Legislative Department of the Brotherhood any part or all of any complaint or claim submitted to the committee, subject to appeal. * * *"

All of these matters refer to the internal organization and procedure of the Brotherhood of Railroad Trainmen and have nothing to do with this proceeding other than to show the utter lack of authority in the Brotherhood to file individual claims on behalf of the respondents, unless the procedure set out in the Brotherhood's Constitution was followed. This, the petitioner could readily verify.

Petitioner, we respectfully submit, confuses the term "collective bargaining" to include claims under, or breaches of, the agreement. "Bargain" means a contract or agreement between two or more parties; a compact settling that something shall be done.

Petitioner, on page 8 of the Petition for Rehearing, cites the *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342 wherein, despite a collective bargaining agreement as to wages *et cetera*, the employer made separate agreements with the employees as to the wages, *et cetera*. It disregarded the collective agree-

ment and made individual agreements with the employees, to the employees' detriment.

These are not the facts in the instant case. Here the bargain has been completed (the Working Schedule heretofore introduced in evidence) and respondents are seeking individually to recover for a breach thereof. Just as 'Jones' would seek to recover under a breach of a lease, or other private agreement, wherein the rights enured to the individual's benefit. There is nothing in this case that can detract from the collective agreement as made, nor is there any necessity or reason for the bargaining representative to be called in to represent, or supervise, or confer in reference thereto.

The quotation from the Telegraphers case implies that it deals with contracts that are effective *in futuro,* rather than a breach of one that is consummated, as we have in the instant case.

Petitioner, however, seeks to transpose its clear meaning thereof to include actions for a breach thereof, which, we respectfully submit, is contrary to the definite decisions of the Courts, the Railway Labor Act, and the fundamental principles of law.

Again petitioner has made the brash statement that it did not contend that the power to make settlement by agreement is vested exclusively in the collective representative. We respectfully submit that we have heretofore shown conclusively that such statement is absolutely contrary to its previously oft-repeated position.

On page 10 of the Petition for Rehearing, the bald statement is made that:

> "Your petitioner is not of the opinion that 'the collective agent also has *exclusive* power to submit the dispute to the Board and to represent aggrieved employees before it.' (Emphasis added.) *These*

matters, also, never were an issue in the case at bar. Consequently your petitioner took no position with reference to them."

We respectfully direct the Court's attention to page 6 of the Reply Brief for Petitioner, at the bottom thereof. The same petitioner who makes the statement in italics above states:

> "Respondents argue (brief, p. 23) that the Board has no jurisdiction of their 'individual' claims because there was no 'authority' in C. H. Williams, Chairman of the Grievance Committee, to present the same to the Board. There is no dispute that C. H. Williams, as Chairman of the General Grievance Committee, was the designated representative of the respondents. *He alone is the official of the Brotherhood authorized to file claims before the Adjustment Board."* (Italics ours.)

As to the argument set forth on page 11 of the Petition for Rehearing, obviously the Court is more astute than the petitioner. Ever since the inception of the "Board" the only people who have been allowed to file cases before it have been the Labor Organizations. Obviously the "Board" as well as petitioner and *amici curiae* are seeking to disregard the latest amendments to the Act, and are still proceeding under the old Act. Under the facts, therefore, petitioner's argument as to the individual's right to file before the Board, necessarily fall. At the bottom of page 12 petitioner's argument is facetious. Naturally no notice can be given to a claimant who is not a claimant, and if he was not a claimant then any award denying him redress would be void, which is the position of respondents in the instant case.

Petitioner has, on page 14 of its Petition for Rehearing, and subsequently therein, sought to introduce a new

and novel theory into the case, to wit, that once a n
joins a union forever after he is the pawn and tool
the officials and he has no rights except those they de
to grant him. He, as an individual, cannot maintain
rights nor seek redress for any wrongs, without first
taining the gracious consent of his master—the Un
Representative. Is this, then, the country of vaunted fr
dom? Are these, then, the precepts with which we
to nurture the minds of our future citizens—obeisance
the new masters, the Union Officials?

The Courts have held otherwise, as we pointed out
our Brief For Respondents, at pages 12 to 16 inclusi
and as has been held by the Court in *Hughes Tool Co
National Labor Relations Board*, 147 F. 2d 69, wher
that express question was passed upon by the Court, wh
states:

> "This case, presenting no question of fact, a
> whether the adjustment of individual grievance is
> exclusive function of the bargaining representat
> • • • ."

The Court answers the question thus:

> " 'Representatives designated or selected for
> purposes of collective bargaining by the majority
> the employees in a unit appropriate for such p
> poses, shall be the exclusive representatives of all
> employees in such unit for the purposes of collec
> bargaining in respect to rates of pay, wages, ho
> of employment, or other conditions of employme
> *Provided that, any individual employee or group*
> *employees shall have the right at any time to pres*
> *grievances to their employer.'* (Italics ours.)
>
> "• • • it is plain that collective bargaining
> respect to rates of pay, wages, hours of employm
> and other conditions of employment which will
> for the future the rules of the employment for eve
> one in the unit, is distinguished from 'grievanc

which are usually the claims of individuals or small groups that their rights under the collective bargain have not been respected."

In Note I thereof, the Court points out:

"* * * Grievances were not confused with bargaining, but were contrasted. This Court very plainly indicated its view that the collective bargain was one thing, and the personal grievance arising under it another thing, in *Moore* v. *Illinois Central R. R.*, 112 Fed. (2d) 959 (2 Labor Cases Par. 18,704). The cases cited by the Board from the Supreme Court, *J. I. Case* v. *N. L. R. B.*, 321 U. S. 332 (8 Labor Cases Par. 51,173); *Railroad Telegraphers* v. *Railway Express Co.*, 321 U. S. 342 (8 Labor Cases Par. 51,174); and *Medo Photo Supply Corp.* v. *N. L. R. B.*, 321 U. S. 678 (8 Labor Cases Par. 51,176); *all deal with making contracts, not with adjusting grievances.* They hold there can be no contracts made except through the bargaining representative. *They said nothing on the subject of personal grievances.* In *Steele* v. *Louisville and Nashville R. R. Co.*, — U. S. — (9 Labor Cases Par. 51,188) the Supreme Court twice likened the collective bargaining to legislation. Grievances similarly resemble cases to be decided according to the law. (Italics ours).

As this Court stated in its opinion:

"Rights of conference are not identical with rights of settlement. But the purpose of conference and the duty to treat is to bring about agreement."

and further on the Court epitomizes the case with the following observation:

"In the view we take the Act guarantees to the aggrieved employee more than merely the right to be heard by the union and the carrier. We cannot say that the terms of the proviso to § 2 Fourth and of §3 First (j) are so limited. Moreover, § 3 First (p) expressly states that the statutory suit to enforce an

award in favor of an aggrieved employee may be brought by 'the petitioner,' presumably the collective agent, or by the employee. All of these provisions contemplate effective participation in the statutory procedures by the aggrieved employee.

"His rights, to share in the negotiations, to be heard before the Board, to have notice, and to bring the enforcement suit, would become rights more of shadow than of substance if the union, by coming to agreement with the carrier, could foreclose his claim altogether at the threshold of the statutory procedure. This would be true in any case where the employee's ideas of appropriate settlement might differ from the union's. But the drastic effects in curtailment of his preexisting rights to act in such matters for his own protection would be most obvious in two types of cases: one, where the grievance arises from incidents of the employment not covered by a collective agreement, in which presumably the collective interest would be affected only remotely, if at all; the other, where the interest of an employee not a member of the union and the collective interest, or that of the union itself, are opposed or hostile. That the statute does not purport to discriminate between these and other cases furnishes strong support for believing its purpose was not to vest final and exclusive power of settlement in the collective agent."

At page 18 of the Petition for Rehearing petitioner again denies the Court's statement as to its former position in reference to the supreme authority of the collective agent. We respectfully refer to page 5 of the Petition for Certiorari of Petitioners, wherein it says that direct bargaining would be the destruction of the policy created by the Railway Labor Act and conflict with the decisions of this Court which prohibit individual dealing with employees. Also on page 8 thereof, in referring to direct dealing with employees, it says:

"* * * thus violating the policy declared by the Railway Labor Act which imposes 'the affirmative

duty to treat only with the true representative and, hence, the negative duty to treat with no other.' "

Also on page 20 thereof, (referring to individual claims) it says:

"The result also will be contrary to the decisions of this Court that the railroads must treat with the designated representative of the employees and imposing the duty 'to treat with no other.' "

So, too, in their Brief For Petitioner, at page 20 thereof, it says:

"* * * the mandatory provisions of the Act, as regards the petitioner imposes the affirmative duty to treat only with the true representative, and, hence, the negative duty to treat with no other.' * * * In addition, the Act imposes the duty upon the petitioner and the designated representatives to consider and, if possible, to decide all disputes 'with all expedition.' "

At page 24 thereof it states:

"* * * the parties merely carried out the duties imposed upon them by the Act 'to settle all disputes' 'concerning rates of pay, rules, and working conditions,' *and that all 'disputes between a carrier or carriers and its or their employees* shall be considered, and, if possible, decided with all expedition, in conference *by the representatives* designated and authorized so to confer * * * .' " (Italics ours.)

And at page 25:

"Thus, treating with the designated representatives is required by the collective bargaining agreement as well as by the Railway Labor Act."

Again on the same page:

"The compulsory provisions of that Act requiring the defendant 'to settle all disputes,' if possible, with the *designated representatives* of the Brotherhood

culminated in the settlement agreement of October 31, 1938." (Italics ours.)

Further on it says:

"* * * that grievances 'shall be taken up' by the General Committee and *not by the respondents individually.*" (Italics ours.)

We have, in our former briefs and herein, considered the authority of the Brotherhood and the law thereof and, hence, will not burden the Court with a repetition herein.

II

The Majority Opinion Did Not Overlook Any of the Rules of the Brotherhood Pertaining to This Case.

Petitioners premise that the decision of this Court destroys collective bargaining is without merit factually or legally. Petitioners consistently misconstrue the term "collective bargaining" to include enforcement of individual rights obtained thereunder.

This, we submit, is evidenced by their insistent misinterpretation of the *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342 and *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, both of which cases pertain to the obtaining of employment contracts on behalf of members. As this Court stated in the *J. I. Case Co.* case:

"The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment."

and further on the Court held:

"But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms."

Beginning on page 21 of the Petition For Rehearing, to the conclusion thereof, we submit that petitioner's specious arguments relating to "specific" authority and general authority of representatives, hardly needs answering again. We respectfully submit that in our Brief For Respondents, at page 23 thereof, Point III, we have answered all of its assertions, innuendos and false conclusions.

In concluding, to give answer to the lie pertaining to what the representatives and their actions before the "Board" may accomplish by requiring authorizations, we respectfully refer to the Appendix attached hereto for other purposes, being a letter addressed to the Office of the Solicitor General by the Carrier Members of the Railroad Adjustment Board under date of October 26, 1945, wherein they state, at the bottom of page 2 thereof:

> "By September 4th, or slightly more than 30 days after authorizations were first furnished, they were being received in such number that the Division was not only able to function at full capacity, but it could not keep up with the cases in which such authorizations were received.
>
> "During the two weeks period from September 4th to 18th the Division rendered 73 awards and was prepared to render awards in some additional dockets on that date. There is attached hereto copy of a communication dated September 27, 1945, to the Chairman of the National Mediation Board reciting the facts as they occurred on September 18th and 19th."

Conclusion to Petition for Rehearing.

We, therefore, respectfully submit that petitioner has failed to show any inadvertence in the majority's opinion, and in its Petition has, at best, introduced nothing that has not heretofore been argued before the Court and that, therefore, this Court should disregard the same.

REPLY TO AMICUS CURIAE MEMORANDUM OF CONGRESS OF INDUSTRIAL ORGANIZATIONS.

I.

We respectfully submit that *amici curiae's* whole argument is summarized by their statement on page 2 of their memorandum:

> "It is our position that the disposition of grievances is an inseparable part of the collective bargaining process."

The whole brief is a scholarly treatise on the union officials' concept of collective bargaining, and reflects vividly their desires as to what they would like the Courts to interpret the law to be, notwithstanding the many conclusive opinions that have been rendered in reference thereto. Each and every opinion that they cite and that counsel for petitioner has cited and those cited by these respondents, uphold and are in harmony with the opinion rendered in the instant case. To hold otherwise would be to disrupt the orderly processes of law and government that have been built up so laboriously in this country. For, were the Court to follow their concepts, we would no longer have a government of the people but, rather, a government of union officials.

Innumerable times throughout their brief *amici curiae* attempt to misconstrue collective bargaining as distinguished from grievances or claims arising thereunder. Their whole brief is based upon this misconception and they seek to warp the meaning of the cases they cite to uphold their contention. Whereas a superficial reading thereof immediately impresses one with the inaccuracies of their contentions.

As the Court stated in *Hughes Tool Co.* v. *NLRB,* Fed. 2d 69:

> "• • • any individual employee or group of e ployees shall have the right at any time to pres grievances to their employer."

We have heretofore cited at length from the *Hughes* c but wish at this time to call the Court's attention to same in response to the allegations made by these *am curiae.*

In answer to their Point II, at page 6, we are prone ask this question. How can the superior economic pow of the employer influence the instant case? It is being tr before an impartial unbiased body, not subject to influenc economic or otherwise, that obviously was brought to b at the case at bar when it was purportedly brought bef the Adjustment Board, wherein these vaunted champi of the working men so miserably failed.

We were unable to find the case ited, *Holden* v. *Har* at 196 U. S. 366, so are unable to answer it.

The case of *Order of Railroad Telegraphers* v. *Railw Express Agency,* 321 U. S. 342, cited by *amici curiae,* d not uphold the contention propounded by them, but, on contrary, is in conformity with the views expressed by t Court and by respondents. So, too, with *NLRB* v. *Jo & Laughlin Steel Corp.,* 301 U. S. 1, 33. Both cases de with obtaining contracts for employees, not with rights action thereunder.

As to Point III, *amici curiae* make the statement t there is no provision in the Railway Labor Act for ployees to present grievances to the employer! Such statement is difficult to understand had the opinion in case been carefully read, for on page 1341, 89 L. Ed., t Court quoted from said Act thusly:

> "The Act's provisions do not require such a

struction. On the contrary they appear expressly to preclude it. The proviso to § 2 Fourth in terms reserves the right of 'an employee *individually*' to confer with management; and § 3 First (j) not only requires the Board to give 'due notice of all hearings *to the employee* • • • involved in any dispute submitted • • •,' but provides for 'parties' to be heard 'either *in person*, by counsel, or by other representatives, as they may respectively elect.' "

Under such a false premise, we submit, their whole argument must be fallacious, as is evidenced in the second paragraph on page 8 of their brief, wherein they maintained the Court held that such union settlements are not permitted, and that there must be settlement with the employees involved. What the Court held in the instant case was (89 L. Ed., p. 1343):

> "• • • an award cannot be effective as against the aggrieved employee unless he is represented individually in the proceedings in accordance with the rights of notice and appearance. • • • It must appear that in some legally sufficient way he authorized it to act in his behalf."

On page 9 of their brief, in the note, they cite the case of *J. I. Case Co.* v. *NLRB*, 321 U. S. 332. This case does not detract in any manner from the individual employees settling their cases, but it does enunciate the duty of the union representative to bargain for the employees' rights in obtaining their employee contract. It nowhere propounds the principle that the employee representative has the right to bargain away the employees' individual rights. The lengthy discussion pertaining to retrospective and prospective rights we do not believe is in point in the instant case because we are dealing entirely with a right of action that accrued by reason of a contract of employment that was broken by the employer. We respectfully submit that the only issues in the present case to be proved by the employee

are, (1) contract, (2) their employment thereunder, (3) the breach thereof by the employer, the petitioner in this case, and (4) the amount of damages the employee is entitled to thereunder, based upon the number of days they were refused work at the scheduled starting time. Certainly this connotes no prospective rights affecting the other members of the union. We, therefore, respectfully submit that it is not incumbent upon this Court to pass upon matters *dehors* the issues in the instant case.

We reiterate, there are no cases of record, of which we are aware after due and dilegent search, holding that the union representative has the authority to waive the individual rights of its members. All of the cases that we have cited in our brief hold that the contrary is the law.

Under Section B, page 15, *amici curiae* refer to Section 26 of the Act, wherein the admonition is given to confer. They fail, however, to cite all of said section, which is the gist of the reason for conference, namely:

> "It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means *to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof.*"

If, in other words, the dispute shall be so involved that it may interrupt the operation of the carrier, Congress has admonished the representatives to confer and if they fail it shall be referred to the Board under which the provisions of that chapter it is authorized to hear and decide the dispute. Obviously not meant to cover a situation such as the instant case. Under the terminology expressed in the Act, we submit, that it is obvious that two different kinds of negotiations are contemplated by the Act.

Section IV of their brief sets out certain cases and

states that they are at variance with the decision in the instant case.

We have heretofore discussed the *O. R. T.* case and the *J. I. Case Co.* case, which, we submit, are in complete harmony with the decision in the instant case and in no way uphold the arguments propounded by *amici curiae* under this point. As stated at the beginning of our reply, the attitude throughout their brief is constant to misconstrue collective bargaining to include claims or grievances arising under a contract obtained through collective bargaining.

The *Medo Photo Supply Corp.* v. *NLRB*, 231 U. S. 678, case deals exclusively with collective bargaining in obtaining a working contract with the employer. That while still represented by the union, the employees made individual contracts of employment, and this Court there stated that such action was a violation of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, with respect to wages, hours and working conditions. At page 679 of the Opinion, the Court therein makes a remark which we believe apropos the instant case, wherein it states:

> "Unless a designated union acquires, by its selection, a thraldom over the men who designate it analogous to the power acquired by one who has a 'power coupled with an interest,' unbreakable and irrevocable by him who gave it, it would seem that any powers the union may acquire by virtue of the designation would end whenever those who confer them and on whose behalf they are to be exercised take them back of their own accord into their own hands and exercise them for themselves. And this should be true, whether or not previous notice is given to the union and whether or not the subject matter of the resumption may include, as one consequence of the dealing, the possible continuance of the agency."

The Court further stated:

> "I do not think Congress intended, by this legislation, to create rights in unions overriding those of the employees they represent."

We cite this to further exemplify the Court's reasoning in the instant case, that had the members so clothed their union officials with authority whereby they could act exclusively for them in all of their matters then, possibly, there would be some legal sense to the position taken by *amici curiae* in their present argument. But such is not the fact, and the Constitution of the Brotherhood of Railroad Trainmen does not purport to give the representatives of the employees thraldom over the employees they represent.

On page 18, *amici curiae* cite *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, and take issue with the holding in that case and the instant case. May we point out that the Court, in the *Hearst* case, gave a broad definition to the word "employee" so as to bring all persons possible under the benefits of that Act. The Court also recognized that at page 122:

> "In short, the assumed simplicity and uniformity resulting from application of 'common law standards,' does not exist."

This is not true respecting the laws of agency. As Justice Rutledge said in the Opinion at page 124, the word employee

> "derives its meaning from the context of the statute, which must be read in the light of the mischief to be corrected and the end to be attained."

The broad definition was given to the term employee for his benefit. In the instant case counsel would have this Court give a broad interpretation to the laws of agency, to the employee's detriment.

In heading number V it would appear that the National

Labor Relations Board is following a procedure expressly declared illegal by the Federal Court, for *amici curiae* cite the *Hughes Tool Co.* case in support of their proposition that, only if the exclusive representative declines to appear, the employer may dispose of the grievance in meetings with the individual employees alone. In truth and in fact the *Hughes Tool Co.* case was decided by the Circuit Court of Appeals in 147 Fed. 2d 69, which we have heretofore discussed (at page 12) and in which the Court stated:

> "• • • it is plain that collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment which will fix for the future the rules of the employment for everyone in the unit, is distinguished from 'grievances,' which are usually the claims of individuals or small groups that their rights under the collective bargain have not been respected."

The Court in that Opinion stated that grievances were not to be confused with bargaining, but were contrasted, and then cited many cases decided by this Court and enunciated clearly that all of them dealt with making contracts, not with adjusting grievances.

In heading number VI *amici curiae* take issue with the apparent intention of the Court to protect minority against majority and suggest that thereby it impairs the collective bargaining process. In note 2 of the *Hughes Tool Co.* case the Court stated:

> "That Congress intended to preserve the right of employees to confer with the employer is further evidenced by the proviso in Section 8 (2): 'Subject to rules and regulations made by the Board pursuant to Section 6 an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.'"

We suggest that the Court is following the well considered legislation of Congress.

It has been suggested that the actions of the union representatives in their collective bargaining for wages, hours and other things pertaining to working conditions, is like legislation. To follow the analogy through, would *amici curiae* suggest that our three divisions of government be abandoned and that the legislature should convene and pass upon every claim or grievance arising out of each and every law that they write in our statute books? Is that not in effect what *amici curiae* and petitioners herein are requesting this Court to sanction when they ask that each agreement that is arrived at through collective bargaining by employee representatives shall be interpreted and given effect to by those same employee representatives when each claim or grievance arising thereunder shall be raised by an individual employee? We think not, and respectfully suggest that if the negotiated contract obtained through collective bargaining be interpreted by the Adjustment Board set up for that purpose or by the Courts who are still one of the arms of government for the settlement of disputes or rights of the individual. Or would *amici curiae* suggest that we have one law for the employees of railroads, another for men who work in offices, another for those who work on our farms, and another for those who work in factories? In effect, is that not what they are asking? We have our constitutional government and the divisions thereof; we have our laws and they apply to contracts; we have our laws and they apply to agents, whether they affect union representatives or otherwise. They have their authority in their union by-laws for specific authorizations, the same as any other agents. We suggest that they follow them.

Respectfully submitted,

JOHN H. GATELY,
Counsel for Respondents.

REPLY TO THE MEMORANDA FOR THE UNITED STATES AS AMICUS CURIAE AND "RAILWAY LABOR EXECUTIVES' ASSOCIATION" AS AMICI CURIAE.

Both the Solicitor General of the United States and counsel representing the Railway Labor Executives' Association, which association does not name the organizations they purportedly represent, have made definite, positive, unequivocable statements pertaining to the far reaching and alleged disastrous effects of this Court's decision on the functioning of the National Railroad Adjustment Board.

The Solicitor General, on page 2, makes the statement:

> "The immediate effect of the decision was to halt the operations of the major Divisions of the National Railroad Adjustment Board, the body established under the Act to handle grievance cases. * * * That had never been deemed necessary in the past. The unions have since undertaken to secure such authorizations, and *a relatively small number of cases have been handled on that basis.* * * * A subsequent disagreement as to whether an authorization from every employee is necessary in a test case brought by one but affecting all craft members has closed down the First Division of the Board again." (Italics ours.)

The statement made by the Railway Labor Executives' Association at page 3, at the top thereof is as follows:

> "We feel that the court should be advised that since the announcement of its decision the National Railroad Adjustment Board has virtually ceased to function. * * * This brief is filed with the deep conviction that the whole process of the orderly adjustment of controversies, which is the fruit of railroad labor legislation obtained after long effort on the part of all concerned, is now in serious jeopardy."

We respectfully submit that the only facts that are properly cognizable by this Court are those set out in the

record before it. The orderly procedure set up by this Court, and the Courts throughout the land, necessitate such a rule. However, in view of the fact that two briefs have been filed with this Court in an attempt to have it reverse its decision in this case, both of those briefs having violated that rule, we have endeavored to ascertain the facts. Regretably, it is our understanding that this Court, according to the statement made by the Solicitor General, who sets out these purported facts, was materially induced to grant the rehearing because of the false and the fraudulent statements made by these two counsel. We can understand the concern of this Court if the impression gleaned from the misstatements made, quoted above, were true. Upon investigation, however, we have found that they are false. Herewith we present as an Appendix the complete correspondence with Mr. Stern and the National Railroad Adjustment Board Secretary. Had Mr. Stern received only the letter from said Secretary, we could understand his misapprehension as to the facts involved. However, under date of October 26, 1945, several days before the filing of his brief in the instant case, a letter was addressed to Mr. Stern by the Carrier Members of the National Railroad Adjustment Board, appraising him of the true facts. He has not seen fit to convey those facts to this Court. As a member of this bar, I believe that this Court is entitled to, and that it is the duty of its members admitted to practice before it, to appraise the Court of all the facts. It is within this Court's power to deal with those who hide or pervert the facts, as it wishes.

From a careful reading of the correspondence, original copies of which are in respondents' possession ready to be submitted to the Court, it would appear that there is a concerted attempt on the part of so-called representatives of labor, as represented by the Labor Members of the Board and the Secretary of the Board and the Railway

Labor Executives' Association and Mr. Stern of the Solicitor General's Office, to create with this Court the impression that, by reason of its decision, the National Railroad Adjustment Board has ceased to function. Whereas, in truth and in fact, the Labor Members of the Board have *refused* to sit in an endeavor to further this impression.

From the correspondence submitted (letter dated September 27, 1945, Appendix, page 35) it is apparent that the named reason for refusing to dispose of cases is because the submission failed to show who one Mr. Law was—whether he was a conductor, a brakeman, a member of the crew, or any facts relative to Mr. Law or any service he might have performed.

At the bottom of page 2, in the letter of October 26th addressed to Mr. Stern (Appendix, page 44) by the Carrier Members, they make this statement:

> "By September 4th, or slightly more than 30 days after authorizations were first furnished, they were being received in such number that the Division was not only able to function at full capacity, but it could not keep up with the cases in which such authorizations were received."

On page 3 of said letter is the following:

> "Particular attention is called to the fact that the demand made by Labor members on September 18th and 19th was not because of any requirement to meet the decision of the Supreme Court of the United States, but it was simply a demand that the Carrier members agree to make an award sustaining a claim of a man not mentioned in the docket and whose name appeared only on an authorization form, with no showing whatsoever as to the facts concerning such man.
>
> "On September 18th and ever since that time there have been at all times a sufficient number of dockets meeting the requirements of the EJ&E decision to have kept the Division working at full capacity. It is

> our information, obtained from the Secretary, that there are at this time a considerable number of such dockets and unless the labor organizations have ceased securing such authorizations there was no reason why at all times subsequent to September 18th the Division could not have continued to function at full capacity."

This, then, is the Board's inability to function. This, then, is the oft repeated phrase in the brief of *amici curiae* for the Railway Labor Executives' Association and the Solicitor General, that, by reason of this decision, the Adjustment Board will cease to function, and that the difficulties are so great in obtaining authorizations that it will nigh be possible for any disputes to be settled.

The brief of the Railway Labor Executives' Association is a scholarly history of the evolution of the present Railway Labor Act, but, because practically all of it is based upon the false premise that we have heretofore brought out, we are constrained to answer it. On page 27 thereof, however, a statement is made in reference to the lack of the individual's right, that is as follows:

> "A right to confer does not necessarily include a right to adjust in conference. A right to be heard by an adjustment board does not necessarily contemplate a right to initiate cases."

In answer thereto we cite *Hughes Tool Co.* v. *NLRB*, 147 Fed. 2d 69, wherein the Court states:

> "The trial examiner seems to have considered the word 'present' means no more than to call attention to the grievance, and that all prosecution of it must be by the representative. We understand the Board to disagree with this interpretation, and to hold that individuals and groups may, under the statute, fully prosecute their grievances through all stages and appeals. The Board is right. No one would think a case in court was 'presented' by merely filing it. A presentation of it would include the taking of evidence, the making of argument, and all things necessary to its full understanding."

We respectfully suggest that the statement made by the Court in the *Hughes* case is the perfect answer to the above argument.

On page 30 *amici curiae* (Railway Labor Executives' Association argument) would seem to present a serious obstacle to this Court's opinion, were it not for the fact that on the face of it the example given is purely a jurisdictional question and can only be settled by the union representatives of the crafts involved. It shows an overlapping of the interests of two crafts or two unions. It necessitates a determination of the point where one craft ends and the other begins, or of the zones where they have joint authority. Congress did not attempt to make any codification of rules governing these jurisdictional controversies. It did not undertake to set a guide for the various principles of agency that would govern the solution of disputes arising from an overlapping of interests from two or more crafts or unions. It established collective bargaining and a command or prohibition to only some of its phases that are enforceable by judicial decree. (*General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-Kansas-Texas R. R.* v. *Missouri-Kansas-Texas C. Co. et al.*, 64 Supreme Court Reporter, 146, 1943.)

Therefore, we respectfully submit the jumbled example of *amici curia* is not applicable to the instant case.

We respectfully submit that any other arguments propounded by *amici curiae* we have heretofore answered in our reply to the briefs of the petitioner and the Congress of Industrial Organizations.

In conclusion we wish to point out the case of the *General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pacific Co.* v. *Southern Pacific Co., et al. General Grievance Committee*

of Brotherhood of Locomotive Firemen and Enginemen v. *General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pacific Co., et al.*, 320 U. S. 338, wherein the Court quoted a statement of the Emergency Board appointed in 1937 thus:

> " 'This legislation was enacted for the purpose of protecting national transportation against the consequences of labor disputes between carriers and their employees. It was devised by representatives of management, the employees, and the public. It secured the benefits of unhampered collective bargaining to the several crafts or classes engaged in the work of railway transportation. When a craft or class, through representatives chosen by a majority, negotiates a contract with a carrier, all members of the craft or class share in the rights secured by the contract, regardless of their affiliations with any organization of employees. It is clearly provided that these rights may be protected by negotiation or by the several methods of adjustment established by the Act. *It is true that the representatives of the majority represent the whole craft or class in the making of an agreement for the benefit of all, but it is equally true that nothing in the Act denies the right to any employee, or group of employees, to enforce through representatives of his or their own choosing, his or their rights under any such agreement. The whole spirit and intention of the Act is contrary to the use of any coercion or influence against the exercise of an individual's liberty in his choice of representatives in protecting his individual rights secured by law or contract.*' "
>
> "The Act provides for proceedings before the Adjustment Board in disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions. Section 3, first (i). *In such cases the parties 'may be heard either in person, by counsel, or by other representatives as they may respectively elect.'*" Section 3, first (i). (Italics ours.)

Conclusion.

We, therefore, respectfully submit that the decision of the majority members of this Court is a true and correct analysis of the law and should not be reversed.

We have shown that the erroneous impression the Court had, which materially affected its decision in granting a rehearing, was not based on the facts. By so doing we have also shown that it is possible to obtain legal and sufficient authorizations for the representatives sufficient to enable the Board to function legally. We believe we have shown that the concensus of law demands that union representatives be not permitted in their "bargaining" to give away or waive the individuals' vested rights. We have endeavored to show the distinction between collective bargaining and the assertion of rights ennuring thereunder, and the distinction between the two, as the Court has so ably done in its decision. We have endeavored to cite cases that were in point under the law and facts involved in the instant case. Petitioner and *amici curiae* have failed to cite any case contrary to the opinion rendered in this case or to the cases we have submitted.

We, therefore, respectfully urge that the decision rendered herein be affirmed.

Respectfully submitted,

John H. Gately,
Counsel for Respondents.

APPENDIX.

September 27, 1945

Honorable H. H. Schwartz, Chairman
The National Mediation Board
Federal Works Building—Room 2018
Washington 25, D. C.

DEAR SIR:

The Carrier Members of the First Division, National Railroad Adjustment Board, desire to inform you of the situation which has arisen on the Division, as follows:

On September 18, 1945, the First Division had before it for consideration Docket No. 20955, Brotherhood of Railroad Trainmen vs. Delaware, Lackawanna & Western Railroad. The claimants were "Conductor J. H. Decker and crew" and "all men who performed similar service subsequent to May 1, 1943." The claim was for an additional day's pay for making side trip on branch line by a crew engaged in interdivisional service. The employees contended the crew had no seniority rights on the branch and that the inter-divisional run did not include the branch.

An authorization for representation by the Brotherhood of Railroad Trainmen had been furnished the Division for J. H. Decker. An authorization had also been furnished for one F. T. Law, but the authorization did not show who Law was, whether he was a conductor or brakeman, whether he was a member of Decker's crew, or any facts relative to Mr. Law or what service he might have performed. His name did not appear in the docket at any place except on the authorization form.

After considerable discussion in which all Division members present participated, Mr. Bishop, member of the Division from the Brotherhood of Railroad Trainmen and

chairman of the Division, prepared an award reading a
follows:

"Docket No. 20955.

The territory between Washington and Phillipsb
is not a part of the interdivisional service establish
between Scranton and Port Morris and claimants hol
no seniority rights to service Washington to Phillip
burg, therefore claim is held to be valid for J. H
Decker and F. T. Law whose authorizations have be
received. Claims of others that may be involved ar
not passed on by the Division.

Award

Claim sustained per findings."

The Carrier Members proposed that the language co
tained in Chairman Bishop's proposed award be change
by eliminating the language following the word "there
fore" and, in lieu thereof, substituting the following:

"Claim sustained for J. H. Decker, and if it be show
F. T. Law was a member of crew of Conductor Decke
claim for Law is sustained."

Chairman Bishop stated he would not accept this pr
posal, that it did not make any difference whether Law w
a member of Decker's crew or not, that they had repr
sentation authority from Law and that his claim must b
sustained. The Carrier Members suggested that the ca
be passed temporarily and other dockets on the calendar b
taken up. Chairman Bishop declined to pass this case. H
stated that no further cases would be taken up by th
Division until Carrier Members agreed to Labor's conte
tion not only for application in this case but in all oth
cases where there were claims for future dates such as we
made in Docket 20955. He also would not agree that th
question could be decided by a referee. The Division the
recessed.

On September 19, the Division again convened and th
Carrier Members offered three alternative proposals fo
awards in Docket 20955, stating that they were willing

accept any one of the three. These three proposals were as follows:

Proposal No. 1:

"The territory between Washington and Phillipsburg is not a part of the interdivisional service established between Scranton and Port Morris and claimants hold no seniority rights to service Washington to Phillipsburg; therefore, claim is sustained for J. H. Decker, and if it be shown that F. T. Law, for whom representation authorization has been filed, was a member of crew of Conductor Decker, claim for Law is sustained. If Law was not a member of Decker's crew, then his claim will not be passed on until such time as adequate facts are presented to the Division.

Award

Claim sustained per findings."

Proposal No. 2:

"The territory between Washington and Phillipsburg is not a part of the interdivisional service established between Scranton and Port Morris and claimants hold no seniority rights to service Washington to Phillipsburg; therefore, claim is sustained for J. H. Decker, and if it be shown that F. T. Law, for whom representation authorization has been filed, was a member of crew of Conductor Decker, claim for Law is sustained. If Law was not a member of Decker's crew, then the Division does not pass on his claim.

Award

Claim sustained per findings."

Proposal No. 3:

"The territory between Washington and Phillipsburg is not a part of the interdivisional service established between Scranton and Port Morris and claimants hold no seniority rights to service Washington to Phillipsburg; therefore, claim is sustained for J. H. Decker.

The Division does not pass on claims for unnamed persons.

Award

Claim sustained per findings."

Chairman Bishop said that none of them would be acceptable to Labor, that the labor representatives had gone as far as they would or could go and would go no further, and that no further business would be handled unless the Carrier Members would accept this proposal and dispose of Docket 20955 on that basis.

A motion was made by the Carrier Members to adopt their Proposal No. 1, but Chairman Bishop declined to put the motion to a vote.

The Carrier Members stated they were ready to proceed with any other docket or any other business before the Division and suggested that Docket 20955 be referred to and determined by a referee. The Labor Members declined to act on such suggestions.

Chairman Bishop then stated there was no further business coming before the Division, whereupon the Members understood the Division was recessed until again convened by call of Chairman Bishop.

Carrier Members present notified the Labor Members that they stood ready and willing to proceed with the making of awards on other cases and to handle any other business in the usual manner, but the Labor Members declined to proceed with the handling of further business.

Very truly yours,

/signed/ F. K. Faherty,
/signed/ L. O. Murdock,
/signed/ O. E. Swan,
/signed/ L. L. McDonald,
/signed/ R. A. Knoff,
Carrier Members.

cc: Labor Members—
Wm. Bishop
M. G. Leach
J. L. Witherspoon
F. J. Williams
Paul M. Carter

Executive Secretary—
T. S. McFarland

OFFICE OF THE SOLICITOR GENERAL

Washington, D. C.

October 16, 1945

Mr. T. S. McFarland, Executive Secretary
First Division, National Railroad Adjustment Board
39 South La Salle Street
Chicago, Illinois

Re: Elgin, Joliet & Eastern Ry. Co. v. Burley

DEAR MR. MCFARLAND:

On Monday the Supreme Court granted the petition for rehearing in the above case, vacated its former decision, and set the case for reargument on December 3. Would you be good enough to keep me advised and up to date on any effects the decision is still having upon the operations of your Division. In addition, I would appreciate it if you would write me a letter stating approximately what you told me over the telephone last month as to the effect of the decision upon your Division, giving details as to the decline in the number of cases heard or disposed of in relation to prior periods.

The Court has invited the Solicitor General to appear in the case, and it will be desirable to have any statements we may make as to the effect of the decision based on something more tangible than my recollection of a telephone conversation.

I am grateful for the assistance you have accorded me so far, which I think may have been among the factors which induced the Court to reopen the case. I trust that these requests will not impose an undue burden upon you.

Yours sincerely,

ROBERT L. STERN,
Special Assistant to the
Attorney General.

October 19, 1945

Mr. Robert L. Stern
Special Ass't to the Attorney General
Washington, D. C.

DEAR MR. STERN:

Receipt is respectfully acknowledged of your letter of 16th instant requesting additional information as to the effect on the First Division of the United States Supreme Court Decision No. 160, Elgin, Joliet and Eastern Railway versus Burley.

The First Division is not holding executive Sessions for the purpose of considering and rendering awards in any of the 3,778 cases awaiting such action.

The Division first discontinued such meetings because of that decision on June 29. Operations were begun again on a small scale on July 31 as a result of Representation Authorizations having been obtained and filed by the Organizations representing the claimants.

Handicapped, and their efforts reduced to a low-minimum by the lack of a sufficient number of such authorizations, the Division continued to function a short time each day until September 19, when such meetings were discontinued because of a situation which grew out of Decision No. 160.

During the four months, July, August, September and October to date, only 141 awards have been rendered by the First Division whereas during the four months immediately preceding that period, namely, March, April, May and June, 483 awards were rendered.

As the situation now stands, the Division is not functioning to the extent of holding meetings for the purpose of rendering awards, and as very few cases are being filed it can be correctly assumed that a new backlog of cases is being accumulated on the Carriers for final submission to the Division if, as, and when the obstacles are removed.

In the foregoing, it has been stated that the Division functioned moderately in giving consideration to dockets

where Representation Authorizations had been received, and it is only fair to say that in connection with a number of dockets, to be exact—24, it was necessary for the Organizations submitting the claims to ask the withdrawal of the names of 27 claimants because they were not available to sign the authorizations, and when it is considered that a substantial number of these claimants were not available because they were in the Army or Navy, the seriousness of the situation can be better understood.

We were asked to withdraw these names from the claims because otherwise the decisions in the cases would be further delayed as the Division would not consider the interest of a claimant as being properly before the Division if he had not signed an authorization.

In stopping the activities of the Division, the services of two Referees were discontinued in the midst of their assignments and they cannot return to complete their assignments because of Decision No. 160, and in addition thereto, a Referee has been appointed in 48 other deadlocked cases, and we cannot avail ourselves of his services.

As I told you over the telephone, the chaotic condition created by Decision No. 160 can hardly be exaggerated, and the seriousness of it is not the inconvenience to which the Division has been placed in its efforts to meet this situation but the harrassing of the claimants, the men on the property who are expected to do the work, has resulted in extreme dissatisfaction on their part.

Furthermore, they could not understand why some case recently docketed (in connection with which an authorization was filed) should be run around other cases which have been on the docket four or five years.

All of this has created a feeling of dissatisfaction on the part of employees of the carriers and creates a fertile field for subversive work on the part of certain factions that we have been trying to keep out of the railroad situation where employees are now being represented by the more conservative organizations. There is evidence that these "certain factions" are not overlooking their opportunity to sew seeds of discontent with a view to establishing them-

selves as the accredited representatives of the more conservative railroad employees.

The question is just how long this condition can safely continue. Congress set up the First Division of the National Railroad Adjustment Board to help keep the peace on the railroads and to prevent interruptions of interstate traffic by rail carriers. The machinery is not functioning and the organizations are no longer bound by their promises not to use their economic strength.

To add to the danger "certain factions" are trying to take over. The situation could get out of control as in 1920 or otherwise.

If there is anything further that I might do to be helpful in clearing up the situation, please command me.

Yours very truly,

T. S. McFARLAND,
Secretary.

TSM:dls

October 26, 1945.

Mr. Robert L. Stern
Special Assistant to the Attorney General
Office of the Solicitor General
Washington, D. C.

DEAR SIR:

Our attention has been directed to a copy of your communication of October 16, 1945, addressed to Mr. T. S. McFarland, Secretary of the First Division of the National Railroad Adjustment Board, and to what Mr. McFarland has furnished us as a copy of his reply under date of October 19, 1945.

Mr. McFarland did not advise Carrier members of any telephone conversation he had with you as referred to in your communication until October 19th, and we have no information as to what he might have said in such telephone conversation.

Because of inaccuracies in Mr. McFarland's letter to you of October 19th, we cannot permit it to go to you as the basis of any action on your part without calling your attention to the facts.

We first respectfully invite your attention to the facts.

On June 11, 1945, the Supreme Court of the United States handed down an opinion in the case of *Elgin, Joliet & Eastern Railway Company* v. *Burley, et al.* Some days later, the attention of the various members of the First Division of the National Railroad Adjustment Board was called to this decision. The Carrier members of the First Division thereafter gave the decision considerable study and consideration, and as a result thereof felt that the situation presented was such as to make legal advice desirable. Accordingly, such legal advice was sought, and as a result thereof the Carrier members on June 29, 1945, served oral notice on the Labor members of the First Division in accordance with Exhibit A attached hereto. As there were no dockets on file with the Division in which the individual claimants had authorized the organization presenting the claim to do so, there were no dockets on which the Di-

vision could act until such authorizations were supplied. All that was required in these dockets under the EJ&E decision was proof of authority, if any.

We are not advised, except through hearsay, as to the action of the various labor organizations appearing in cases pending before the First Division, but immediately prior to July 31, 1945, the Chairman of the First Division, who is a Labor member, called attention to the fact that there were some documents received, signed by individuals, authorizing the labor organizations to handle their claims. Carrier members advised the Labor members that they were ready, and had been at all times, to proceed to handle all claims which met the requirements as laid down by the Supreme Court in the Elgin Joliet & Eastern case, and on July 31st two awards were made by the Division. Thereafter, other authorization forms reached the Division, and as quickly as such forms were received the Division took up and acted on the dockets in which there were authorizations.

During the month of August authorization forms continued to reach the Division and as each docket was completed by proof of authority the Division promptly proceeded to act on such docket. By September 4th, or slightly more than 30 days after authorizations were first furnished, they were being received in such number that the Division was not only able to function at full capacity, but it could not keep up with the cases in which such authorizations were received.

During the two weeks period from September 4th to 18th the Division rendered 73 awards and was prepared to render awards in some additional dockets on that date. There is attached hereto copy of a communication dated September 27, 1945, to the Chairman of the National Mediation Board reciting the facts as they occurred on September 18th and 19th.

Since September 19th the Labor members of the First Division have refused to sit or to consider on the Division any dockets whatsoever, in accordance with their statements made on September 19th, notwithstanding the fact that the dispute covered by Docket 20955 has since been disposed of on the property and withdrawn from the Division.

Particular attention is called to the fact that the demand made by Labor members on September 18th and 19th was not because of any requirement to meet the decision of the Supreme Court of the United States, but it was simply a demand that the Carrier members agree to make an award sustaining a claim of a man not mentioned in the docket and whose name appeared only on an authorization form, with no showing whatsoever as to the facts concerning such man.

On September 18th and ever since that time there have been at all times a sufficient number of dockets meeting the requirements of the EJ&E decision to have kept the Division working at full capacity. It is our information, obtained from the Secretary, that there are at this time a considerable number of such dockets and unless the labor organizations have ceased securing such authorizations there was no reason why at all times subsequent to September 18th the Division could not have continued to function at full capacity.

Referring to Mr. McFarland's reply to you of October 19th, we make the following comment:

The second paragraph of the communication is correct, the reason therefor being set out in the communication to the Chairman of the Mediation Board as hereinabove referred to.

The third paragraph is not correct. The Division discontinued holding executive sessions for the reasons set out in the letter of September 27, 1945, hereinbefore referred to.

The fourth paragraph is not accurate. Beginning with July 31st the Division handled promptly dockets in which authorizations had been supplied, and by September 4th the Division was able to devote its full time each day to a consideration of pending cases.

The fifth paragraph of Mr. McFarland's letter is entirely misleading. He undertakes to compare the number of awards made during the months of July, August, September and October (3½ months) with the four months of March, April, May and June. No awards were rendered during the month of July until July 31st, there being no proof of

authority furnished until that date. During most of August authorizations received were not such as to keep the board functioning at the normal rate, but by September 4th they were coming in at such rate that the Division was devoting its full time to the consideration of dockets before it. If there is to be a comparison of operations under the requirements laid down in the EJ&E case, it should be during such period of time as normal operations were possible. An accurate comparison would be to take the period September 4th to 18th during which 73 awards were rendered. Mr. McFarland, however, points out, without explanation, that 483 awards were rendered during the four full months of March, April, May and June, and only 141 during July, August, September and October. He failed, however, to call your attention to the fact that of the 483 awards 135 were made by five different referees. This leaves 348 made by the Division, without a referee, during the four months, or an average of 87 per month. Compare this 87 per month with the 73 made during the two weeks in September by the Division without a referee. The real fact is that beginning September 4th functioning of the Division was more satisfactory and we were disposing of more cases than had ever been true before.

Referring to the sixth paragraph of Mr. McFarland's letter, the Division is not functioning for the reasons heretofore stated. If cases are not being filed before the Division as the Secretary states, it can only be assumed it is due to the action of the Labor organizations, or to more sincere efforts to settle claims on the individual properties.

As to the seventh paragraph of Mr. McFarland's communication, we have no knowledge of the number of claimants whose authorizations could not be secured because they were in the Army or Navy, or the number of individuals who have declined to sign forms authorizing Labor Organizations to present claims for them.

As to the ninth paragraph of Mr. McFarland's communication, there is no reason why the two referees in question might not have completed their assignments long before this if the organizations in question had secured proof of authority and filed them with the Division. As to the

referee appointed in the 48 other deadlocked cases, there is no reason why this referee should not report and proceed to handle these cases as authorizations have been received on all of these dockets.

As to the tenth paragraph of Mr. McFarland's letter, it must be borne in mind that Mr. McFarland has no knowledge of anything which took place in the Board Room except possibly hearsay statements. The decision of the Supreme Court did not create any chaotic condition whatsoever. It merely required that before a claim could be handled there must be evidence of authority of the person presenting it to do so. This did not place any inconvenience whatsoever upon the Division, nor could it result in harassing of any claimant.

The eleventh paragraph is so worded as to create an entirely false impression. Mr. McFarland, as well as all labor representatives, knows that for years it has been the practice on the First Division to handle so-called "hearing-waived" cases ahead of "hearing" cases which might have been on the docket four or five years. No change whatsoever in this practice has been brought about.

As to the twelfth paragraph of Mr. McFarland's letter, this would seem to constitute merely conclusions on the part of Mr. McFarland. What he refers to as subversive factions, we do not know, nor do we know to whom he refers when he says "we have been trying to keep out of the railroad situation" these subversive factions.

Very truly yours,

/signed/ R. A. KNOFF,
Vice Chairman, for Carrier Members.

CC: *Labor Members:*
Wm. Bishop
M. G. Leach
J. L. Witherspoon
F. J. Williams
Paul M. Carter
Secretary T. S. McFarland

October 26, 1945.

Honorable H. H. Schwartz, Chairman
The National Mediation Board
Federal Works Building, Room 2018
Washington 25, D. C.

DEAR SIR:

Referring to the communication of Carrier members of the First Division of the National Railroad Adjustment Board, addressed to you under date of September 27, 1945, concerning the situation on the First Division growing out of the consideration of Docket 20955, *Brotherhood of Railroad Trainmen* v. *Delaware, Lackawanna & Western Railroad*, we attach hereto for your information a copy of our letter of this date to the Labor members of the First Division.

Very truly yours,

/signed/ R. A. KNOFF,
Vice Chairman, for Carrier Members.

cc: Labor Members—
Wm. Bishop
M. G. Leach
J. L. Witherspoon
F. J. Williams
Paul M. Carter

Executive Secretary—
T. S. McFarland

October 26, 1945.

Memorandum to: Labor Members—
Wm. Bishop
M. G. Leach
J. L. Witherspoon
F. J. Williams
Paul M. Carter

Referring to communication addressed by the Carrier members of the First Division of the National Railroad Adjustment Board to the Chairman of the National Media-

tion Board under date of September 27, 1945, a copy of which was sent to you, this is to respectfully call your attention to the communication of October 15, 1945, from the Secretary of the First Division to the Vice President of the Delaware, Lackawanna & Western Railroad and to the President of the Brotherhood of Railroad Trainmen, advising that Docket 20955, *Brotherhood of Railroad Trainmen* v. *Delaware, Lackawanna & Western Railroad* "having been withdrawn is removed from our calendar of cases."

The case having been withdrawn from the Division, are you not therefore in position to resume consideration of other dockets pending before the Division? Your prompt advice will be appreciated.

/signed/ R. A. KNOFF,
Vice chairman, for Carrier Members.

cc: Mr. T. S. McFarland, Secretary.

October 29, 1945.

Memorandum for Members:

Herewith copy of letter of 26th instant from Robert L. Stern, Assistant to the Attorney General.

T. S. MCFARLAND,
Secretary.

TSM:dls

—Attachment—

OFFICE OF THE SOLICITOR GENERAL

Washington, D. C.

October 26, 1945.

Mr. T. S. McFarland
National Railroad Adjustment Board
First Division
39 South LaSalle Street
Chicago 3, Illinois

DEAR MR. MCFARLAND:

Re: Elgin, Joliet & Eastern Ry. Co.
v. Burley

Thank you very much for your letter of October 19. It will be very helpful. If you or any of the members of your Division have any additional information or wish to present their views or make any suggestions, I will of course be very glad to receive them. I am engaged in preparing the brief to be submitted by the Government on the re-argument, and will appreciate all the expert assistance I can obtain.

Sincerely yours,

ROBERT L. STERN.

October 30, 1945.

Memorandum to: Carrier Members—
Messrs. R. A. Knoff
T. K. Faherty
L. L. McDonald
L. O. Murdock
O. E. Swan

Replying to your memorandum of October 26th concerning the situation existing on the First Division making it impossible to function and your reference to withdrawal of Docket No. 20955.

We are aware that you Carrier Members were able to prevail on the Delaware, Lackawanna and Western and secure the withdrawal of Docket No. 20955, but in view of the fact that such cases had always been previously handled by the Division and your commitment as to the kind of cases you were willing to pass on and the further fact that the Division has for years and immediately preceding the discussion on Docket No. 20955 handled cases coming to the Division in the form that were handled by the committees on the railroads, the withdrawal of Docket No. 20955 doesn't settle anything. In fact, there are so many of these claims that it would only be a few hours or a day or two until we met with the same controversy so from our viewpoint it is useless to waste the time of the members of the Board in handling only such dockets as the Carrier Members may feel disposed to consider.

We are prepared to take up the dockets and handle same on the basis that the dispute has been progressed with the Carrier up to the Board as we have been doing since the Board started to function until you Carrier Members conceived the idea of limiting the functioning of the Board to such cases that pleased your convenience to handle.

If and when you are prepared to resume handling on the basis of considering and deciding cases as submitted to the Board; in other words, recede from the position you took when Docket No. 20955 was under consideration and get down to earth following the former procedure, we believe the Board can again function—otherwise, it seems we would only be wasting our time.

S/ Wm. Bishop,

Chairman—For Labor Members.

cc: Mr. T. S. McFarland, Secretary

October

Memorandum to: Labor Members—

Wm. Bishop
M. G. Leach
J. L. Witherspoon
F. J. Williams
Paul M. Carter

We are in receipt of communication dated
dressed to Carrier Members signed by Mr. I
Labor Members in which reply is made to ou
October 26th concerning the situation existing o
Division, reference being made to a withdrawal
20955.

You, of course, are in error in your assum
Carrier Members prevailed on the D. L. & W. f
pose of securing the withdrawal of Docket 2095

With respect to your position as to further h
the Division of cases now on its docket, you, of c
definitely the position of Carrier Members.

/signed/ R. A. Kn

Vice Chairman, for Carrier

), 1945.

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FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 160

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,
A Corporation,
Petitioner,

vs.

G. W. BURLEY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

MOTION OF BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ORDER OF RAILWAY CONDUCTORS OF AMERICA AND SWITCHMEN'S UNION OF NORTH AMERICA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE,

and

BRIEF OF AMICI CURIAE.

HAROLD C. HEISS,
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V. C. SHUTTLEWORTH,
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In the Supreme Court of the United States

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G. W. BURLEY, *et al.,*
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

The Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors of America, and Switchmen's Union of North America, acting through their attorneys, the undersigned, hereby move the Court for leave to file a brief as *amici curiae* in the above entitled action for reasons hereinafter stated. Consent to file this brief has been received from the petitioner, but denied by the respondents.

Request is made for leave to appear for oral argument.

Typewritten copies of this motion and brief were forwarded by registered mail to attorneys for the petitioner and the respondents, respectively, on the 27th day of November, 1945.

INTEREST OF MOVING PARTIES.

The Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors of America, and Switchmen's Union of North America are three of the five train-service organizations (the other two being the Brotherhood of Locomotive Engineers and the Brotherhood of Railroad Trainmen) representing, for the purposes of the Railway Labor Act, virtually all of the engineers, firemen, conductors, trainmen, switchmen, hostlers and hostler helpers employed by the railroads of the country engaged in interstate commerce. Substantial portions of the efforts and resources of these organizations are devoted to the continuous task of representing individual, or groups of, employees in the presentation and settlement of their grievances against the carrier-employers by the process of bargaining, and the use of other means of settlement provided by the Railway Labor Act. The opinion of the Court rendered in the instant case will, if allowed to stand, compel changes to be made in the long-established methods used by these representatives in the handling of grievances. These changes will add to the burden of representation; there will be confusion and uncertainty as to the right of the carriers' and the employees' representatives to settle grievances, and the process of arriving at settlements will be prolonged and made increasingly difficult. Being thus immediately affected, both with respect to the claims and grievances now in the process of adjustment as well as those to be handled in the future, by the opinion rendered in the instant case if it is allowed to stand, these organizations ask that they be allowed to express their views by the accompanying brief and by oral argument before being concluded in the premises by the ultimate disposition of this case.

The Railway Labor Executives' Association, in which organization the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors of America

and the Switchmen's Union of North America hold membership, has participated in this hearing as *amicus curiae* by filing a brief in suport of the petition for rehearing. If the views expressed in the Association's brief are understood by this Court to be that the Railway Labor Act contemplates, allegedly consistent with the established practice in the industry prior to the enactment of the Railway Labor Act, that the adjustment of grievances involving the interpretation and application of collective bargaining agreements shall be vested exclusively in the bargaining representative of the craft or class, so as to deprive the individual employee of the right to assert and settle his grievance in person or through a personally chosen representative, then such views are completely at variance with the facts and with the views held by the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors of America and the Switchmen's Union of North America. The facts as known by these organizations and their views respecting the procedure for handling grievances incorporated by the Congress into the Railway Labor Act are set forth in the accompanying brief.

Dated at Cleveland, Ohio, this 27th day of November, 1945.

HAROLD C. HEISS,
714 Keith Building,
Cleveland 15, Ohio,

RUSSELL B. DAY,
714 Keith Building,
Cleveland 15, Ohio,

V. C. SHUTTLEWORTH,
Merchants National Bank Bldg.,
Cedar Rapids, Iowa.

In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 160

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,
A Corporation,
Petitioner,

vs.

G. W. BURLEY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

BRIEF OF AMICI CURIAE.

STATEMENT OF THE CASE.

Certain of the facts of this case set forth in the reported opinion of the Court[1] deserve to be emphasized by restatement here because of their bearing upon the argument that follows.

The respondents are ten employees of the Elgin, Joliet & Eastern Railway who are members of the Brotherhood of Railroad Trainmen, the designated representative of certain of the carrier's employees for the purposes of the Railway Labor Act. The respondents and a number of other employees were called to work by the carrier at times not consistent with Article 6 of the collective bargaining agreement. Article 6, the employees claimed, governed their starting time, but this the carrier disputed. Numerous complaints were made by the respondents through the

[1] *Elgin, J. & E. Ry. Co. v. Burley*, 65 S. Ct. 1282.

Brotherhood and time slips were filed. In addition to this, the respondents authorized the Brotherhood to submit their complaints to the National Railroad Adjustment Board. This was done. Some time afterward the carrier and the Brotherhood met and came to agreement, settling some sixty-one grievances, including the claims based upon the alleged violations of Article 6. The result of this settlement was an agreement that Article 6 would, for the ensuing ninety days, be observed by the carrier in calling the respondents and other employees to work. If, at the end of that trial period, either the carrier or the employees were dissatisfied, a new schedule of starting time would be worked out. As a part of the settlement it was, in effect, agreed that the time claims that had been filed were thereby disposed of and no further claims based on the violation of Article 6 would be filed by the Brotherhood. Later, and in apparent repudiation of this settlement, the individual time claims of the respondents were filed with the National Railroad Adjustment Board against the carrier. These were ruled on adversely by the Board. The respondents now seek to enforce their claims in the courts. And this Court has indicated an intention to permit this to be done, as we understand it, if it be shown that the Brotherhood did not possess at the time of settlement a clearly articulated authorization from the respondents to settle their time claims at the same time and as a part of the settlement of their dispute with the carrier concerning the applicability of Article 6 to them.

ARGUMENT.

At the outset we wish to state with emphasis that we are opposed to the thesis that the bargaining representative of the craft or class is, or should be, vested with exclusive authority to settle grievances of the employees comprising the craft or class, growing out of the interpretation and application of the collective bargaining agree-

ment. The right to personally handle and settle a grievance, or to personally choose a representative to accomplish this purpose, must be preserved to the employee. *It does not necessarily follow, however, that if the right of the employee to handle his grievance is recognized, then the concomitants of a common law relationship of principal and agent must be found to exist between the employee and the railway labor organization before the latter can assume to settle the grievance with the carrier.* The grievances that arise from the interpretation and application of collective bargaining agreements on the railroads are multitudinous. The manner in which they are customarily handled is a long-established and well known procedure within the industry. The vast majority of grievances have in the past been handled and settled by the Brotherhoods acting for the employees. A recognition by the Court of the practical necessities of the situation will point the way to a result that will preserve to the employee the right of control of the disposition of his grievance, and will at the same time not saddle the normal process of grievance adjustment with the burdensome qualities of common law agency relationship. Of this, more will be said later.

The Right of the Employee to Choose His Own Representative for the Settlement of Grievances Was an Established Right Among the Transportation Employees Prior to the Enactment of the Railway Labor Act.

Any assertion that the settlement of grievances held by train-service employees has in the past been vested exclusively in the bargaining representative of the craft or class is simply not consistent with the facts. The one instance known to the undersigned in which this question has been before the courts was in *General Committee of Adjustment of Brotherhood of Locomotive Engineers v. Southern Pacific Company*, 320 U. S. 338. The facts of record in that case abundantly confirm the statement just made.

The origin of the *Southern Pacific* case lay in two disputes, one between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, and the other between the Order of Railway Conductors of America and the Brotherhood of Railroad Trainmen. The Transcript of Record of that case in this Court reveals[2] that the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, on May 17, 1913, entered into an agreement known as the Chicago Joint Agreement for the purpose of resolving the major differences between the two organizations growing out of their representation of the engineers' and firemen's crafts employed on the railroads of the country engaged in interstate commerce. Among the provisions of this agreement was the following:

"ARTICLE 7.

(a) The right of any engineer, fireman or hostler to have the regularly constituted committee of his organization represent him in the handling of his grievances, in accordance with the laws of his organization and under the recognized interpretation of the General Committee making the schedule, involved, is conceded."

By this agreement the fact was recognized and established for the future that an individual employee was free to choose the organization of which he was a member, whether it be the Brotherhood of Locomotive Engineers or Brotherhood of Locomotive Firemen and Enginemen, to handle his grievances, subject to the condition that any settlement of a grievance must be consistent with the "recognized interpretation" put upon the collective bargaining agreement by whichever organization negotiated

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[2] R. 669-725. See explanation of Chicago Joint Agreement, R. 198-203; also see Transcript of Record, pp. 231-256, to same effect in *General Committee v. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323.

it. There could hardly be a clearer repudiation of the thesis that representation for the purpose of settling grievances was, prior to the enactment of the Railway Labor Act, vested exclusively in the bargaining representative of the craft or class than this declaration by the two Brotherhoods parties to the Chicago Joint Agreement. The Agreement remained in effect, and was expanded by two supplementary agreements, until October 1, 1927.

The dispute on the Southern Pacific Railroad involving the four Brotherhoods was submitted to an Emergency Board appointed by the President under Section 10 of the Railway Labor Act on April 17, 1937. The Board, in its report to the President, made the following statement as its finding concerning the practice of the Order of Railway Conductors of America and the Brotherhood of Railroad Trainmen in recognizing the right of individual conductors and trainmen to choose their personal representatives for the purpose of settling grievances:

> "So far as the documents involved are concerned, the principal difference between this case and Case No. 1 (Brotherhood of Locomotive Engineers v. Brotherhood of Locomotive Firemen and Enginemen), is that the Brotherhood of Railroad Trainmen in its Agreement with the Carrier has made no special provision for representation where a member of its Order is operating as a conductor, instead of as a brakeman or other trainman. However, since for many years members of the Trainmen's Organization, acting as conductors, have been conceded by the Order of Railway Conductors the right to be represented throughout by the Trainmen's Organization, in disputes involving the Conductors' Agreement, it seems clear that until the present dispute arose, this was the agreed and accepted policy of both Organizations. This right as shown by case No. 1 is in accordance with the provisions of the Railway Labor Act."[3]

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[3] *Southern Pacific* case, R. 744.

The United States District Court before which the dispute between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen in the *Southern Pacific* case was tried (in which action the Southern Pacific Company was defendant) made the following significant finding of fact:[4]

"7 (a) In the operation of Pacific Lines, there arise individual claims and grievance cases, involving disputes between individual employees and defendant as to their respective rights under the agreements referred to in paragraph 5 and as to matters not covered by said agreements. It is and ever since long prior to the enactment of the Railway Labor Act has been the custom for an engineman who has an individual claim arising out of any such dispute, and who desires the Firemen's or Engineers' Brotherhood (or other representative) to represent him in presenting and handling to conclusion the claim against defendant, to select whichever brotherhood (or other representative) he desires. In such cases a claimant engineman is not and never has been required to choose as his representative the brotherhood or labor organization selected as a representative for collective bargaining by the majority of employees in the service in which the claimant was employed when the dispute arose.

"(b) The usual manner of handling such individual claims is and since long prior to the enactment of the Railway Labor Act continuously has been for the claimant to select as his representative the brotherhood of which he is a member, regardless of the craft or class in which he was employed when the dispute arose. In a limited number of cases, the claimant presents or has presented his claim to defendant directly and without representation, or he selects or has selected another organization or individual to represent him. Such presentation and handling to conclusion of a claim by the individual

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[4] *Southern Pacific* case, R. 48-50. These findings were not disturbed by the Circuit Court of Appeals, 132 F. 2d 194.

directly concerned, or a representative other than the brotherhood to which claimant belongs, is within the scope and meaning of the 'usual manner of handling.' When a claim, after initial presentation to defendant, is handled further with defendant's officers, or subsequently presented to the National Railroad Adjustment Board, it is usually handled by the same brotherhood (or other representative selected by the claimant) as presented the claim to defendant.

"(c) On almost every railroad in the United States, all individual claims, grievances and disputes of enginemen against their employers, whether within the scope of a collective bargaining agreement or not, and whether involving rights arising from such agreement or not, are and from a date long prior to the passage of the Railway Labor Act have been handled in the manner hereinabove set forth as applicable to defendant's Pacific Lines, and such was at all said times and is now the usual manner of handling such claims."

An additional fact revealed by the *Southern Pacific* record is that the Brotherhood of Locomotive Firemen and Enginemen has never assumed to represent a Brotherhood member, or a non-member, in the handling of a dispute if the employee did not desire the Brotherhood to handle the dispute.[5]

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[5] Testimony by Mr. D. B. Robertson, President of the Brotherhood of Locomotive Firemen and Enginemen, on examination by Mr. Donald Richberg, R. 207-208:

"Mr. Richberg:

Q. Turning now to the question of representation, Mr. Robertson, has your Brotherhood ever claimed the right to represent a member or a non-member having a grievance dispute against the wishes of the employee who had the grievance?

A. No, sir.

Q. Has your Brotherhood ever claimed the right to control the settlement of a grievance of a member or non-member who did not wish to be represented by your Brotherhood in the settlement of his grievance?

A. No, sir."

The record in the *Southern Pacific* case discloses that the thesis of exclusive representation has never been an actuality in the handling of grievances of the train-service employees. The record correctly reveals that grievances have customarily been handled and settled by a Brotherhood selected by the employee as his representative, whether the employee be a member or non-member of that Brotherhood and regardless of whether the Brotherhood chosen was the bargaining representative of the craft or class to which the employee belonged. There has been no practice or custom of denying to an employee the privilege of personally handling his grievance to a conclusion, or choosing any representative he wished, assuming he indicated a desire to exercise that privilege.

The Railway Labor Act contains no language expressly declaring an intention on the part of Congress to change the established procedure in the industry for the handling of grievances. As a matter of fact, quite the opposite purpose is indicated by the adoption of the language of § 3 First (i) of the Act reading,[6]

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; * * *."

We venture to suggest that in view of the freedom enjoyed by employees since long prior to the enactment of the first Railway Labor Act (44 Stat. 577-587) in selecting representatives for the handling of grievances, and in view of the declared intention of Congress that the established method of handling grievances was to be continued unal-

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[6] 45 U. S. C. § 153, First (i).

tered under the Railway Labor Act, no argument or purpose that can be brought forth should possess sufficient inducement to impel this Court to the conclusion that the Railway Labor Act vests in the representative of the craft or class exclusive authority to settle the grievances of employees comprising the craft or class. If, indeed, there exists any argument or purpose capable of tempting the Court to the adoption of such a result, the temptation must surely be short-lived when thought is given to the constitutionality of such a result. We refrain from the development of this issue for in the majority opinion the Court clearly acknowledges its awareness of the probable invalidity of an attempt by Congress to deprive an employee of control over the settlement of his claim against the carrier. The minority opinion lends no support to the thought that the Court would be in disagreement on this point.

The Decision of the Court Regarding the Authority of a Representative to Settle Grievances Should Sustain the Established Practices of the Industry.

The Court, in searching the relationship between the ten respondents and the Brotherhood of Railroad Trainmen for evidence of a grant of authority from the respondents to the Brotherhood to settle their claims, was dominated, one might fairly say, by an ultra-conservative view. The Court pondered the fact that the respondents had filed their claims with the Brotherhood for lodgment against the carrier and had approved their submission by the Brotherhood to the National Railroad Adjustment Board. But these actions were rejected by the Court as insufficiently indicative of a grant of authority to the Brotherhood to settle the respondents' claims. The Court then inquired whether the collective bargaining agreement could conceivably be the source of authority to the representative to settle the respondents' grievances. It concluded that this could

not be permitted, for otherwise it would lie within the power of the collective bargaining representative to create its own authority through agreement with the carrier. The rules and regulations of the Brotherhood were also examined. Among these was Rule 7 which provided that after a grievance was transmitted to the General Grievance Committee for handling, the Committee "shall have power to alter, amend, add to or strike out * * * any part or all of any complaint or claim submitted to the Committee, subject to appeal to the entire General Committee and/or Board of Appeals. A General Grievance Committee may authorize their chairman to handle all grievances received from local lodges with the management for settlement * * *." This grant of authority from the member to the Brotherhood was declared by the Court to be insufficient because the regulations failed to "unequivocally" authorize the Brotherhood to settle the member's grievances.

We are compelled to conclude from this treatment of the problem that the Court proposes to apply a common-law standard, designedly suitable to the relatively simple relationship of principal and agent, as the test of the authority of a railway labor organization to handle and settle the host of grievances which must be expeditiously and effectively disposed of if the Congressional enjoinment "to avoid any interruption to commerce or to the operation of any carrier engaged therein"[7] is to be accomplished.

We wish to respectfully suggest to the Court that the entertainment of this proposed view could be commended as reasonable only if the problem under consideration were weighed wholly detached from the realities of its environment. If a strait-jacket of legal restrictions is not to shackle the railway labor organizations in the performance of the services expected of them by the Congress and the country at large as outlined in the Railway Labor Act, the

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[7] 45 U. S. C. § 151 a(1).

mind of the Court must be accurately attuned to the practicalities of the problems faced by these representatives.

It is not possible in the present stage of this litigation for us to present facts and data portraying the frequency with which grievances arise in railroad operation, the protracted lengths to which negotiations must sometimes be carried in an effort to arrive at settlements with the carrier, and the extent to which personalities, underlying forces and objectives foreign to the immediate issues sometimes exercise a dominant role in the settlement of disputes between carriers and their employees. But a detailed record of such facts is not, we believe, essential to an appreciation by the Court of the problems of grievance settlement sufficient to avoid the establishment of a rule of law unsettling to the relationships of the industry. In lieu of such a record, the Court can take note of the fact that the National Mediation Board has promulgated the rule (revealed by the issues in *Switchmen's Union v. National Mediation Board*, 320 U. S. 297), that all the employees of one craft or class employed on one entire railway system must be represented for contract bargaining purposes by a single representative. Since this representative normally handles the majority of the grievances arising within the craft or class being represented, it follows that one grievance committee and its chairman handle the grievances originating from hundreds, or, on the largest systems, thousands of employees. The Court may also note that for the five years, 1940-1944, (the period is selected at random) there were submitted to the National Railroad Adjustment Board 14,194 grievances. Of these, 8,277 were disposed of by the Board's decisions.[8] It is reasonable to assume that only a minor portion of the total number of grievances that develop, eventually find their way to the Adjustment Board.

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[8] Sixth, Seventh, Eighth, Ninth and Tenth Annual Reports of the National Mediation Board, including the Report of the National Railroad Adjustment Board.

Judging on the basis of numbers alone, the magnitude of the representatives' task is impressive. We suggest that in the light of this fact alone, glaringly evident appears the impracticableness of compelling the representative to first secure from each aggrieved employee a specific authorization of unqualified authority to settle his grievance, or, in the alternative, to secure the individual assent of each interested employee to the terms of a grievance settlement, before the carrier can assume to deal with the employees' representative as a responsible spokesman.

We respectfully urge this Court to not promulgate, in the course of deciding the instant case, a rule which will have the consequences just described.

We have tried to explain why we are utterly opposed to the opinion of the Court holding that the authority of a representative to handle and settle grievances is to be conditioned by the rules and principles definitive of the authority of a common law agent. The Court is being pressed by some advocates to adopt an equally extreme, but opposite, view in which all control over the settlement of grievances is denied the employee and vested exclusively in the contract bargaining representative of the craft or class of which the employee is a part. This result is believed to be, as we have also explained, equally impossible of acceptance, for it departs radically from the practices long followed in the industry; it is without substantial support in the terms of the Railway Labor Act; it is contrary to the opinions expressed by the sponsors of the Act, as revealed by the reports of the Congressional Committees,[9] and, foremost, it would transcend the powers of the Con-

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[9] Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, on H. R. 7650, 73d Cong., 2d Sess. Hearings before the Committee on Interstate Commerce, United States Senate, on S. 3266, 73d Cong., 2d Sess.

Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, on H. R. 7180, 69th Cong., 1st Sess. Hearings before the Committee on Interstate Commerce, United States Senate, on S. 2306, 69th Cong., 1st Sess.

gress in a manner proscribed by the Due Process Clause of the Fifth Amendment.

In lieu of both of these extreme positions, we propose to the Court a middle ground—one which preserves the principle of individual control over the settlement of grievances, but which also avoids obstructing the normal processes of settling grievances by collective bargaining. We propose that this Court hold that the established procedure in the handling of grievances reveals a sufficient grant of authority to the representative chosen by the employee to permit it to handle grievances to a conclusion, subject, however, to the right of the employee, exercised prior to the moment of settlement, to personally assume command of the grievance adjustment or to specify the terms of settlement.

The *sine qua non* of this procedure is the act of the employee in filing his claim or grievance with the Brotherhood for presentation to the carrier. Grievances normally begin their journey to settlement by the employee referring the matter for handling to the local officer of the Brotherhood of which he is a member. If the employee is not a member of any railway labor organization, he refers it to the organization of his choice. It then becomes the purpose of the organization, wielding such of its influence and power, or all of it, as need be, to secure from the carrier an agreement either that the practice complained of will cease, or that the claim will be honored by payment in whole or in part, or both, as the case may be. The process that follows is primary knowledge to employees.[10]

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[10] Mr. David B. Robertson, President of the Brotherhood of Locomotive Firemen and Enginemen, testifying in *General Committee v. Southern Pacific Company, supra*, on direct examination by Mr. Donald Richberg, explained the usual manner of handling grievances both before and after the adoption of the Railway Labor Act to be as follows:

"Q. With your familiarity, Mr. Robertson, with the practice on the railroads over a long period of years in the han-

(Continued on following page.)

An employee referring his grievance to a railway labor organization knows as a matter of fact, or should be understood to assume, that his grievance will be prosecuted by the organization to a conclusion, through whatever proceedings it must perforce be taken to effect a settlement. The organization's services having thus been enlisted, it normally proceeds to handle the grievance without doubt as to its authority. A carrier, being requested by a representative of its employees to meet for the purpose of settling grievances, ordinarily responds by treating with the representative without misgivings (it should be entitled to do this owing to the fact that the duty of bargaining with its employees is enjoined upon it by the Railway Labor Act) as to the fact of authorization from the employee to the representative to handle the grievances he purports to deal with.

(Footnote 10 continued.)

dling of grievance disputes, what is meant by 'the usual manner' in which disputes are handled? What is the usual manner in which such disputes are handled?

* * * * *

A. The usual manner of handling grievances today, if a man has a grievance he takes it to his local lodge—I am speaking now of the B. of L. F. & E.—takes it to his local lodge and files it. If the Lodge thinks he has a meritorious case, they refer it to the local chairman to handle it. He takes it up with the local official. On some railroads you are required to take it up with the mechanical department officials. On others you take it up with the operating department officials. The usual manner is, it is referred to the local committee by the man who has a grievance, referred to the local committee or lodge of which he is a member, and he takes it up and handles it with the local man, and when he has failed to reach a settlement, it is then referred to the general chairman. The general chairman then takes it up with the local officials. If he fails, he usually calls on the organization, the Grand Lodge of his organization, to send an officer, who then takes and handles it with the higher official, and if they fail to make a settlement, they invoke the other portions of the Act—mediation, arbitration, and in some instances the appointment of an Emergency Board. That is the usual manner." (Transcript of Record, *General Committee v. Southern Pacific Company*, pp. 203-205.)

The suggestion we make is that the Court attach to this existing mode of procedure a legal approbation which has not heretofore been required. This step becomes necessary now only as an escape from the alternate course of forcing upon the industry (by the decision in the instant case) methods of procedure not of the industry's choice, methods which promise to be destructive of the rights of the individual, or, in the alternative, burdensome to the representatives of the employees in the performance of the functions devolved upon them by the Railway Labor Act.

Our suggestion, in legal effect, is that a railway labor organization having received from an employee in the accustomed manner a grievance for handling, should be held to have thereby acquired adequate authority to handle the grievance to its ultimate settlement. And the carrier, having been requested by the organization to negotiate with it for the purpose of settling the grievance, may assume without further inquiry to deal with the representative as the authorized spokesman of the employee for the purpose of disposing of his grievance. At the same time the employee retains the right at any time prior to settlement to notify the carrier and the organization of his intention to resume control of his grievance, and thereafter handle it in person or through other representatives.

The Court, conceivably, could adopt the view that a labor organization presumptively possesses the requisite authority to handle and settle the grievances of the employees comprising the craft or class represented by it for contract bargaining purposes. Such a presumption might arise not by reason of any action on the part of the employee having the grievance, but solely by virtue of the fact that the organization is the statutory representative of the craft or class for the purposes of the Railway Labor Act. This presumption of authority would continue to the time of settlement, subject to the right of the interested

employee to take control of his own grievance adjustment. But this thesis harbors the embarrassing possibility of an employee discovering that his grievance had been settled by negotiation between the craft's representative and the carrier without the employee even being aware that his claim has been the subject of bargaining. This predicament cannot arise (barring bad faith on the part of the representative) when the right of a representative to handle a grievance is conditioned by the requirement that the authority to handle a grievance shall begin with, and is derived from, the act of filing or lodging the grievance with the labor organization for handling in the accustomed manner.

Another possible solution of the problem would be to hold that mere membership *per se* in a railway labor organization gives rise to the presumption that the organization has the authority to handle the grievances of its members. But this solution is capable of the same harsh consequences infecting the proposal discussed in the immediately preceding paragraph. The rules and regulations of some railway labor organizations are sufficiently inexplicit that they fail to apprise a member that the organization assumes on the basis of such rules, without further authorization, to handle the member's grievances to a conclusion. A member of such an organization would, if this thesis were adopted, risk discovering that a grievance held by him had been settled, although he had not filed it with the organization for handling and had, perhaps, altogether different intentions concerning its disposition.

Solution of this problem likely will be found in one of three possible conclusions, to-wit, (1) the conservative view proposed by the opinion of the Court; (2) the opposite extreme, of delegation by legislative (or judicial) fiat of exclusive authority to the craft representative; and (3) the moderate, practical view herein proposed. *We suggest to the Court that it not lose sight of the significant fact that*

the railroad brotherhoods have been handling the grievances of members and non-members throughout the industry for more than half a century, and in that time the question of the organizations' authority to settle grievances has not become a problem, either as between the members and the organization, or between the organizations and the carriers. If the subject is not whipped into vexatiousness by legislative or judicial interference with the established processes of grievance settlement, the Court and all concerned are entitled to look upon the action of the ten respondents in the present case as a singular instance of attempted repudiation of a settlement normally arrived at. The present case is, within our knowledge, and with the exception of *General Committee v. Southern Pacific Company*, the only occasion in which the courts have been called upon to resolve a dispute of this character arising within the railroad industry. The *Southern Pacific* case was itself the product of legislative interference, rather than being another illustration of strife between employees and labor organizations over the right of personal representation. The issue in the case was whether the Railway Labor Act had vested in the representative of a craft or class complete and exclusive control over all subjects of interest to the employees comprising the craft.

In conclusion, we respectfully submit that this Court should, as a practical result, confirm the right of the carrier to continue its long-established practice of dealing with the employee's personally chosen representative as the responsible spokesman for the employee in the matter of settling grievances. To the employee should be preserved the right to handle his grievances personally, or have them handled by the representative of his choice. And these respective rights should be reconciled by the decision that a railway labor organization, once having received from the employee a claim for handling in the usual manner, must be held to thereby have the author-

ity essential to handle the claim through the proced
contemplated by the Railway Labor Act, including
mission to mediation, arbitration or Adjustment Boa
proceedings, to its ultimate settlement, but recogniz
always the right of the employee to affirmatively resu
control of the claim prior to the time of its settlement
by appropriate notices to the organization and the carrier.

Respectfully submitted,

HAROLD C. HEISS,
RUSSELL B. DAY,
V. C. SHUTTLEWORTH.

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In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 160

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,
Petitioner,

vs.

G. W. BURLEY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE
and
BRIEF FOR BROTHERHOOD OF LOCOMOTIVE ENGINEERS
and
BROTHERHOOD OF RAILROAD TRAINMEN AS AMICI CURIAE ON REARGUMENT.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

The undersigned, Brotherhood of Locomotive Engineers and Brotherhood of Railroad Trainmen, by their attorneys, hereby move the Court for leave to file a brief as *amici curiae* in the above entitled action, and represent to the Court as follows:

Said Brotherhoods are associations whose membership, respectively, comprises the large majority of employees of the principal railroads of the United States who are employed as locomotive engineers and as trainmen, switchmen and train baggagemen. The respective General Committees of said Brotherhoods have collective bargaining contracts with substantially all of the principal railroads of the United States concerning rates of pay, rules and working conditions of said classes of employees.

The issues in this case are concerned with the right of the collective bargaining representatives to settle grievances of employees covered by said collective agreements, and are of great interest and importance to said Brotherhoods in the representation of said classes of employees. The right to proceed in the disposition of cases now pending

before the National Railroad Adjustment Board in whi
General Committees of said Brotherhoods appear as repr
sentatives of the employees concerned will be determine
by the decision to be rendered in this case.

Said Brotherhoods are not members of, or represente
by, any of the associations or organizations on behalf
which briefs *amici curiae* have been filed herein.

Said Brotherhoods have obtained the consent of th
petitioner to the filing of a brief *amici curiae* herein b
the respondents have declined to give their consent
the filing of such brief. Manuscript copies of this bri
have been furnished to the parties.

Dated at Cleveland, Ohio, this 29th day of Novembe
1945.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS and BROTHERHOOD OF RAILROAD TRAINMEN AS AMICI CURIAE ON REARGUMENT.

STATEMENT.

The facts are sufficiently set forth in the Court's opinion heretofore rendered herein.

This brief is submitted by the Brotherhood of Locomotive Engineers and Brotherhood of Railroad Trainmen, as *amici curiae,* to bring to the attention of the Court certain considerations deemed to be important in the decision of this case. These Brotherhoods and their members obviously are greatly interested in the effect of the decision upon the functioning of the Railway Labor Act. The views herein set forth are intended to supplement those of the parties and other *amici curiae* in presenting a full understanding of the issues before the Court.

Statement of Position of the Brotherhood of Locomotive Engineers and Brotherhood of Railroad Trainmen.

It is the position of the Brotherhood of Locomotive Engineers and Brotherhood of Railroad Trainmen that, under the Railway Labor Act, the duly designated representative of a craft or class of employees has authority to settle with a carrier disputes between individual members of such craft or class and the carrier growing out of the interpretation or application of the collective agreement and to submit such disputes to the National Railroad Adjustment Board without proof of specific authority from such employees so to do.

ARGUMENT.

1. The nature of grievance disputes and the problem presented.

In Part I of the Court's opinion the differences are discussed between disputes over grievances and those concerning the making of collective agreements. These differences and differences in the statutory treatment of the two types of disputes exist, but we think they are not controlling upon the issues here presented. Before considering their significance and effect, however, we believe it appropriate to draw the Court's attention to the type of "grievances" which are involved here. In general, they are disputes which are referable to the National Railroad Adjustment Board. One of the sponsors of the 1934 amendments to the Railway Labor Act defined such disputes as including those over seniority, amount of pay for the class of work performed, separation from service, unjust dismissal, promotion, reduction in force or recall in seniority order, and many other similar matters.[1] Specifically, the "grievances"

[1] See testimony at Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7650, 73rd Cong., 2nd Sess., pp. 80-81, and Hearings before Senate Committee on Inter-

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here at issue involve the interpretation and application of a collective agreement rule, to wit, Article 6 of the agreement between the Brotherhood and the carrier. They are of the class defined in § 2, General Purposes, (5), and § 3, First, (i), as "disputes * * * growing out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." The settlement of this type of dispute, as we shall show, is among the most important features of the statutory plan[1] because of its close relation to the "making and maintaining" of craft agreements and to peaceful relations between men and management.

(a) The volume of the grievance load.

As of June 30, 1944, there were on file with the National Mediation Board 4428 railroad collective agreements covering some twenty crafts or classes of employees.[2] The Board in its First Annual Report emphasized the significance of the agreements and their importance as follows:[3]

"The absence of strikes in the railroad industry, particularly during the last 2 years when wide-spread

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state Commerce on S. 3266, 73rd Cong., 2nd Sess., p. 34. See also table of cases decided by the First Division of the National Railroad Adjustment Board "classified as to subject matter," appearing in the First Annual Report of the National Mediation Board, p. 50, as further illustrating the type of disputes referable to the Board.

[1] In reporting out the 1934 amendments the House Committee stated:

"The second major purpose of the bill is to provide sufficient and effective means for the settlement of minor disputes known as 'grievances,' *which develop from the interpretation and/or application of the contracts between the labor unions and carriers fixing wages and working conditions.*" (Emphasis supplied.) H. Rep. No. 1944, 73rd Cong., 2nd Sess., p. 2.

[2] Tenth Annual Report of the National Mediation Board, pp. 38-40. Agreements for express, Pullman, miscellaneous and airline carriers are excluded in the above count.

[3] First Annual Report of the National Mediation Board, p. 36.

strikes, the usual accompaniment of business recovery, prevailed throughout the country, is to be explained primarily not by the mediation machinery of the Railway Labor Act, but by the existence of these collective labor contracts. For, while they are in existence, these contracts provide orderly, legal processes of settling all labor disputes as a substitute for strikes and industrial warfare. *Theoretically all disputes are settled by the collective agreements, but of course many differences of opinion arise as to the meaning and application of the agreements.* * * *" (Emphasis supplied.)

Actually disputes over the meaning and application of agreements arise with great frequency and constitute one of the most serious of labor problems on the railroads. A first indication of the extent of the grievance load may be gained from noticing the total of cases lodged with the National Railroad Adjustment Board. As of June 30, 1944, there were pending before the Board 6133 cases, of which 5873 were before the First Division. New cases were being docketed at the rate of 2467 per year.[1] It will be borne in mind that the Board cases are drawn from the unsettled residue of those arising on the various railroad properties.

As a further indication of volume, examination of the annual statistics of the Brotherhood of Railroad Trainmen is illuminating. For the year ending June 30, 1944, the Adjustment Board reported that the B. of R. T. filed 979 cases before Division 1.[2] The Report of the president of the B. of R. T. for the year 1944 discloses that during this year the organization's vice presidents and deputy presidents, in assisting B. R. T. general committees, handled 3951 grievance cases with railroad managements. The claims in such cases were disposed of as follows: allowed

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[1] Tenth Annual Report of the National Mediation Board, Table 15, p. 41.

[2] Tenth Annual Report of the National Mediation Board, p. 52.

or compromised 2416; withdrawn 541; referred to National Railroad Adjustment Board 113; to be handled further on the property 881.[1] These statistics show that the 113 cases thus referred to the Adjustment Board are less than 3 percent of the total handled by the grand officers. If this ratio be applied to the 979 B. R. T. cases filed with the Board during the year ending June 30, 1944—which include the number filed without grand officer assistance—it would appear that the Brotherhood's general committees handled some 38,000 grievances on the properties in one year for this single organization. The figure reaches its true significance when the volume of grievances dealt with at local levels is considered. General committees prosecute only the unadjusted grievances referred to and accepted by them when local committee action fails. It is estimated that no more than 5 to 10 percent of the grievances handled by local committees ever reach the general committees. While these estimates are not precise, enough has been said to indicate the great magnitude of such grievances.

(b) The necessity of settlement or adjudication with the aid of representatives.

Of particular interest in the case at bar are the data respecting settlements made on the property. It will be observed that 2957 or 75 percent of the 3951 grievances handled by B. R. T. grand officers, as aforementioned, were closed out on the properties. They correspond in position to the settlement made in the instant case, i.e., they were negotiated at the highest level of management after local

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[1] This Report is on file in the Library of Congress. Copies will be furnished to the Court and counsel. The data here stated are from an analysis of the reports of the above named officers shown at pp. 80-250 of this volume.

efforts had failed. And they included compromise settlements.[1]

It is demonstrably clear that "on the property" settlements are essential in the disposition of grievance cases of the type under consideration here. Coordinator Eastman, at the hearings on the 1934 amendments, referred to the necessity of the organizations and the railroads "settling all disputes that they can at home" to prevent flooding the Adjustment Board with cases.[2] In 1936 the Mediation Board expressed its thought that the compulsory adjudication of disputes by the Adjustment Board "is rapidly bringing about the change in labor relations in the industry

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[1] See, as an example, "Chicago, Burlington & Quincy R. R. (File 4476)—Interchange of cars, and time claims.

On March 27, 1944, Deputy President J. A. Rash (326) assisted our committee in handling with the management claim of three senior unassigned extra yardmen (foreman and two helpers), Chicago Yard, for a minimum day's pay at basic yard rates on certain days when (1) B&OCT, (2) CMStP&P, (3) Illinois Northern, (4) IHB, and (5) CR&I crews are used to perform transfer movement of cars originating on the Burlington. Understanding was reached that the present practice of interchanging cars with the B&OCT, IHB and CR&I Railroads at Western Avenue yard will continue for the duration of the war and for a period not to exceed 90 days thereafter. Within 90 days following the cessation of hostilities the management and committee will confer and agree upon a mutually satisfactory arrangement whereby CB&Q yardmen will make deliveries of cars assembled at Western Avenue for interchange with the B&OCT, IHB and CR&I Railroads, either direct or through some intermediate line, or agree upon some other mutually satisfactory arrangement that will give to CB&Q yardmen their share of the work made a basis of dispute in claims Nos. 1, 4 and 5. The practice of CMStP&P and Illinois Northern crews taking cars from Western Avenue Yard, which is the basis of dispute in claims Nos. 2 and 3, was discontinued February 8, 1943. In view of the mutual understanding as expressed in the foregoing, all claims growing out of disputes described in claims Nos. 1, 2, 4 and 5 were withdrawn, and in claim No. 3 a compromise agreement was reached governing the manner of payment to the yard crew or members thereof when available but performed no service during the period September 4, 1942, to February 8, 1943." (Report of the President B.R.T., 1944, p. 6A-89.)

[2] Hearings before House Committee on H. R. 7650, 73rd Cong., 2nd Sess., p. 48.

which it was hoped the law would accomplish, viz., an increasing tendency to *settle controversies on the properties where they arise* without any recourse to legal procedure.[1] (Emphasis supplied.) However, in practice the number of unadjusted cases brought to the Board continued to mount until it reached serious proportions. The problem was considered by the Attorney General's Committee on Administrative Procedure[2] and has been the subject of repeated conferences between Brotherhood and carrier representatives and officials of the Government. On February 13, 1945, President Roosevelt delegated Mr. Edward J. Connors, an official of the Union Pacific Railroad, to make an analysis and report of the 5000 undecided cases pending before the First Division of the Adjustment Board and to give his recommendations for "(a) Settlement or disposition of such disputes; (b) Reduction in the number of controversies submitted to the First Division and improvement in methods and procedure for the more expeditious handling of cases." Although, so far as we are aware, Mr. Connors' report to the President has not yet been made or released, we may advise the Court of certain results that have recently been achieved toward clearing the Board's docket. Under date of October 11, 1945, Mr. Connors reported to the chief executives of the five engine and train service Brotherhoods that there were 3674 cases pending before the First Division, a net reduction of 1438 cases since his assignment was undertaken, this reduction representing the withdrawal or decision of 2298 cases minus 860 new cases filed during the period. He also advised that 5000 additional cases in prospect of submission to the Division had been disposed of. While this record is encouraging, it appears, as pointed out by Mr. Connors, that "the ultimate solution of this problem must be met in the improve-

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[1] Second Annual Report, p. 34.

[2] Report of the Committee, Sen. Doc. No. 8, 77th Cong., 1st Sess., p. 188.

ment in the settlement effort or clarification of rules on those railroads on which an excessive number of cases are submitted." Such a solution, we submit, can be achieved only by collective action by employee and carrier representatives.[1]

The practical necessity of collective bargaining in the adjustment of grievances is apparent from the nature, scope and extent of the grievances themselves and the techniques employed in their settlement. The wide scope and complexity of railroad collective agreements are well known to students of labor relations.[2] This Court has had access to

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[1] The technique used on many roads in reducing the number of Board cases was that the respective Brotherhoods and the carrier appointed joint reviewing committees which analyzed the cases, and then disposed of them in groups by payment, compromise or withdrawal on the basis of precedents or agreed to principles.

[2] "The content of the agreement embraces the whole field of labor relations in great detail. One of the larger carriers, for example (the Baltimore and Ohio Railroad with a mileage of approximately 6,400), has 53 written trade agreements with the standard railway unions. The agreements average about 5,000 words in length. * * * An indication of the detail and complexity found in railway agreements is the following array of subject matter contained in a trainmen's agreement: (1) Detailed subdivisions relating to remuneration—rates of pay, guarantees of daily earnings, rates of pay on freight service, on local service, to starting points, from point of assignment, for dead-heading, for learning road, for extra work, for run-around, and for freight turn-around service; (2) detailed subdivisions relating to other conditions—basic working day, guarantees of work, seniority, seniority rosters, grievances, work not required of trainmen, transportation of goods, physical examination, employment of injured employees, and lunch periods. * * * The agreements for the conductors, engineers, firemen, trainmen, and clerks give about one-third of their space to describe the functioning of the general rules. The firemen's agreement, for example, contains 153 items covering 70 pages. Of these, 28 items deal with wages, 29 with the working day, 39 with seniority, 29 with grievances and protection against discrimination, and 28 with working conditions.

An illustration of how the interpretative material grows is given in the seniority rule of the railway clerks. In the 1909

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typical agreements for engineers and firemen in *General Grievance Committee etc. v. Southern Pacific Co.* (Nos. 27 and 41, October Term 1943), 320 U. S. 338. The variety of claims arising under such agreements is exhibited in the classification of cases according to subject matter made by the First Division of the Adjustment Board in its first annual report, to which we have referred. One hundred eight separate types of cases were so listed in the cases decided in one year.[1]

As pointed out by *amici* counsel, grievances of the type under discussion often involve large numbers of individuals in complex situations.[2] We cite some additional illustrations. There are the so-called "blanket" cases where a grievance is handled for one man or crew but its disposition governs others similarly situated. Thus, in an engineer's case the claim was stated as follows:[3]

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agreement it read: 'In all cases of promotion or making reduction in force, other things being equal, the clerk longest in the service will be given the preference, the superintendent's decision to be final.' By 1927 this rule had expanded to cover approximately six pages of the agreement.

By modification and interpretation, a general term of the agreement is expanded to relate to the whole employment situation, and at the same time it is clarified so as to cover all possible grievances which might arise under it. The same processes are observed in the agreements of other unions. The conductors clarify a section dealing with 'extra work'; the firemen and engineers give 15 pages of examples for the functioning of their wage schedule; the engineers clear up difficult problems by the 'question and answer' method; the signalmen give a mathematical interpretation of the term 'monthly rate'; and the maintenance-of-way employees provide detailed rules for seniority rosters at each subdepartment." *Written Trade Agreements in Collective Bargaining*—N. L. R. B., Division of Economic Research, Bulletin No. 4, pp. 119-122.

[1] First Annual Report of the National Mediation Board, Table III, p. 49.

[2] See also Garrison, *The National Railroad Adjustment Board; A Unique Administrative Agency*, 46 Yale L. J. 567, 586.

[3] Award No. 7594, Docket No. 10401, National Railroad Adjustment Board, First Division (Brotherhood of Locomotive Engineers—Great Northern Railway).

"(1) Claim of Engineer I. Ellis * * *, who was first out in the engineers' extra board, for time lost plus deadheading * * * account locomotive crane X1795 working * * * without locomotive engineer handling the locomotion of this machine, which was performed by a maintenance of way employee; claim also covers all other extra engineers on the different extra boards on the system, who were * * * first out on their respective extra boards when such road machinery was used. Claim is also made for 100 miles for all other engineers on the various extra boards because of not being advanced on their respective extra boards due to the first extra engineer being denied this service."

"(2) Claims of engineers for time lost plus deadheading, if any, who were first out on extra board and entitled to this work" when self-propelled machines or cranes were used [in other instances specified].

The claim was based upon a rule in the engineers' agreement providing in substance that whenever electric or other power is installed as a substitute for steam, locomotive engineers shall have preference for positions as engineers or motormen. The claim was sustained.

The application of this award involved the ascertainment of the identity of the engineers who were on the extra lists on the dates when, and at the places where, the locomotive cranes were used; which engineers were available under the "first in first out" rule; from what sources men would be drawn, and who should be called when there was no extra list or said list was exhausted; at what points deadheading would be required, and the deadheading time involved for each such man; and the applicable rate of pay —all covering a period of several years.

We think the Court will be interested in the ultimate disposition of such claims. There appears to be no public source of information as to the number or identity of the claimants in cases such as the foregoing one, or the amount of money involved. We may inform the Court, however, that records in the offices of the Brotherhood of Locomotive

Engineers disclose that in this case claims were paid to 1001 engineers amounting to $1,093,487.36. These records also show that in the settlement of said claims an agreement was made between the Brotherhood's General Committee of Adjustment and the carrier providing a formula for the ascertainment of the claims and also clarifying the rules concerning the manning of self-propelled machines. This agreement in the latter respect was like that made in the case at bar, which included settlement of the question of the application of the starting time rule. In practice it thus appears that the settlement of claims and the future application of the rules are often intertwined.

Other examples serving to illustrate various types of grievance disputes and their ramifications are set forth below.[1] In addition there is reprinted in Appendix 1 here-

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[1] In Award No. 1763, Docket No. 3241, National Railroad Adjustment Board, First Division (O.R.C. and B.R.T.—Lehigh Valley RR.), the claim was made for all passenger conductors, baggagemen, trainmen and flagmen for one extra yard day for being required to "yard" their trains at the completion of their trip, which work was claimed to be regular yard work belonging to yardmen and not to be performed by road passenger men under the collective agreement rules. The claim was allowed. We inform the Court, from information in the B.R.T. files, that the settlement in this case involved 267 men who received $263,613.39.

Award No. 5196, Docket 6877, N.R.A.B., First Div. (B.R.T. —Central R. R. of New Jersey) involved the reinstatement of all head-end passenger trainmen or baggagemen who had been removed from certain assignments, with compensation for the difference of their earnings in their present and former assignments; and also claimed such difference in earnings for all other passenger trainmen who were displaced under seniority rules to other positions by those who had been removed. The claim was sustained, and the report of a B.R.T. officer shows that it was included in a settlement involving awards under which the train service employees will receive several hundred thousand dollars. (Report of the President, Brotherhood of Railroad Trainmen 1944, *supra*, p. 6A-88.) The fact that this claim had to be handled by the Brotherhood before payment could be obtained is also significant. As in many other cases, the parties had to reach agreement by the process of collective bargaining before the claims actually were approved for payment.

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to Award No. 9231 of the First Division of the Adjustment Board which, in the findings of the Referee, contains an illuminating discussion of the practice concerning multiple claims on behalf of unnamed individuals.

As an example of grievance adjustments made "on the property" which involve many persons, the following settlement is summarized in the report of the President, Brotherhood of Railroad Trainmen 1944, *supra*, at p. 6A-130:

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In Awards Nos. 5141, 5142, 5144, and 5145, N.R.A.B., First Div., the statements of claim read:

"Claim of Engineer J. L. Nau and Fireman I. Fladness, of the Casper Division, for 2 hours and 30 minutes switching at Greybull, February 25, 1938. Also claim for Engineer and Fireman first out on the extra board on this and all subsequent dates when road crews performed switching covered in Rule 22 of the Engineers' and Firemen's schedules." (Award No. 5141, Docket No. 9396.)

"Claim of Engineer H. A. Gibson and Fireman E. L. Miller, Casper Division, for eight hours at yard rates account of performing station switching July 14, 1938, in addition to making up their own train in Greybull Yard. Claim is also filed for Engineer and Fireman first out on the extra list on this and all subsequent dates when road crews are used to perform eight hours or less switching for which they are available under Rule 22 of Engineers' and Firemen's schedule." (Award No. 5142, Docket No. 9397.)

"Claim of Engineer W. C. Roberts and Fireman J. W. Houlihan, Casper Division, for eight hours at yard rates account of being required to switch baggage cars on the head end of No. 30 before departing from Casper, December 18, 1936. Claim is also made for Engineer and Fireman first out on the extra list on this and all subsequent dates when road crews are used to perform eight hours or less extra switching." (Award No. 5144, Docket No. 9399.)

"Claim of Engineer W. C. Roberts and Fireman J. W. Sturm, Casper Division, for a day's pay at yard rates on account of performing yard service in Casper September 22, 1936, upon their arrival on passenger train No. 31. Claim also filed for Engineer and Fireman first out on the extra list on this and all subsequent dates when road crews are used to perform eight hours or less switching." (Award No. 5145, Docket No. 9400.)

"Pittsburgh & Lake Erie R. R. (Files 7697 and 6002-221)—Docket of miscellaneous cases, and revision of schedule covering road and yard men.

Deputy President W. E. B. Chase (636) was assigned on August 29, 1944, to assist our committee in prosecuting with the management a docket of 77 miscellaneous cases. Numerous conferences were held commencing September 12, and Brother Chase reported on November 14 that all cases were disposed of, as follows: 59 cases were allowed, one of which involved the payment of approximately 7,000 time claims and seven others involved the payment of an additional yard day to some 3,000 crews [9,000 or more men] amounting to approximately $70,000. Seventeen cases were withdrawn which were unsupported by rule. New rules were agreed upon covering some of the points in dispute. One case was declined and will be submitted to the National Railroad Adjustment Board, First Division, for determination. A revision of the schedule covering road and yard men was also negotiated, effective December 1, 1944. Several thousands of dollars will accrue to road crews as result of the re-establishment of two divisions, and trainmen operating between Pittsburgh-Cleveland and Pittsburgh-Ashtabula will benefit approximately $300 per month on account of being placed on a straight-away basis. In the revision, all former standard and other favorable rules were retained, and thirty new rules and eighteen new clauses were added, which will prove beneficial to all the employees on the property."

The process of adjustment of grievances requires specialized knowledge, skill and training not possessed by individuals. The claims are written up and briefed. It is common to cite numerous precedents in support, including settlements of analogous prior claims, agreed to interpretations, agreements supplementing the printed collective agreement often evidenced by correspondence, arbitration awards, mediation agreements, orders of the Railroad Administration and the United States Labor Board, and decisions of the former regional Train Service Boards

of Adjustment and of the present National Railroad Adjustment Board.[1]

The carriers generally maintain personnel departments staffed with men expert in such matters and assisted by legal counsel. It is the experience of the Brotherhoods that while in the early days local superintendents, general superintendents and general managers usually dealt with committees in the handling of grievances, now such cases find their way to the personnel department where they are given highly technical construction and treatment. The organizations in turn are required to develop men of experience and skill to serve on grievance committees. Thus, there are local grievance committees for each local lodge of a Brotherhood on a given railroad. These committees are headed by a "local chairman" who remains in active service. A General Grievance Commitee or General Committee of Adjustment is maintained by each organization on the road, comprised of the local chairmen. The chairman of the General Committee, called the General Chairman, on the principal roads devotes his full time to the committee's work, maintains an office, and keeps the necessary records and files. As heretofore indicated, there is available to such General Committees the assistance of grand officers from the national offices of the Brotherhood.

Thus staffed and equipped the representatives of the employees and railroad carry on the intricate day to day business of adjusting grievances. It is inconceivable that individuals could perform this function. Indeed, they do not attempt to do so with any frequency, at least above the local level. Instead, there has grown up through the years under statutory influence and command a clear pattern for

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[1] In Award No. 5196, *supra*, the Brotherhood cited five cases of the United States Labor Board, one General Order of the Railroad Administration, and four Adjustment Board decisions in support of its claim. See also Garrison, *The National Railroad Adjustment Board; A Unique Administrative Agency*, *supra* p. 581.

the handling of grievances in the railroad industry known as the "usual manner of handling" by representatives of employers and employees.

2. The "usual manner of handling" grievances, and the long established method of submitting them to Adjustment Boards.

The engine and train service Brotherhoods have had long experience with collective agreements.[1] The process of handling grievances arising under these agreements prior to World War I was described by Walker D. Hines, Director General of Railroads in 1919 and 1920, as follows:[2]

> "Generally, speaking, under private control of railroads, if a labor union had an agreement with a railroad management defining rules and working conditions, provision was made for appeal by an employee from any disciplinary action taken by a local official. As a rule in any such appeal the employee would be represented by the appropriate officer of his union. The appeal could be carried, if necessary, to the chief executive or chief operating officer of the railroad company. If he was unwilling to modify the action of the local official it resulted that the employee and his union had to acquiesce in this action unless a strike was called and a better adjustment was thereby obtained. • • •
>
> Controversies relating to the meaning and application of agreements prescribing rules and working

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[1] Among the oldest of American labor unions now in existence are the Brotherhood of Locomotive Engineers (1863); Order of Railway Conductors (1868); Brotherhood of Locomotive Firemen & Enginemen (1873); and the Brotherhood of Railroad Trainmen (1883). In 1873 the locomotive engineers had a written agreement with the Pennsylvania Railroad, and the Brotherhoods named each had written agreements dating back to the 1880's and 1890's. While these early agreements were brief, they provided for union recognition, seniority and promotion, and specified wage rates and hours of work. *Written Trade Agreements in Collective Bargaining*, N.L.R.B., *supra*, pp. 115, *et seq.*

[2] *War History of American Railroads*, by Walker D. Hines, p. 155.

conditions were subject to settlement in a manner similar to that above outlined as to disciplinary matters in cases where there were working agreements in unions.

When the Government took control of the railroads, the question arose as to whether all such controversies should continue subject to the final decision of the chief operating officer on the particular railroad. General Order No. 8 [of the Railroad Administration] provided: 'Matters of controversy arising under interpretations of existing wage agreements and other matters not relating to wages and hours will take their *usual course*, and in the event of inability to reach a settlement will be referred to the Director General.'" (Emphasis supplied.)

To provide a review of a chief operating officer's decision certain Boards of Adjustment (together with a procedure for unorganized employees) were established by the Railroad Administration. The texts of the orders promulgating these Boards are set forth and discussed at pp. 4 to 8 of the brief of counsel for the Railway Labor Executives' Association filed herein and need not be repeated here. However, it will be recalled that the agreements under which Boards Nos. 1, 2 and 3 were established provided that grievances or controversies arising under interpretation of wage agreements "will be handled in their usual manner by general committees of employees up to and including the chief operating officer of the railroad," when, if an agreement is not reached, after further handling by the chairman of the general committee of employees and the chief executive officer of the organization concerned, the case might be lodged by the latter and the carrier's officer with the appropriate board. It was further provided that no matter would be considered by such board unless referred to it in the manner prescribed, and that in hearings before the board the employees should be represented by a person designated by the chief executive officer of the organization concerned. Thus, on railroads where agreements were in effect, it was recognized with govern-

ment approval that the "usual" manner of handling grievances was by "committees of employees."

Mr. Hines commented:[1]

> "* * * In practice [before these Boards] each Board handled controversies for all its classes of labor on all the railroads under federal control, because even if on a particular railroad there was no agreement between the management and a union representing the particular class of employees, nevertheless any unsettled controversy could be presented by the appropriate national union representative to the Railroad Administration's Division of Labor, whereupon the appropriate Board of Adjustment would be asked for its recommendation, and this would generally be adopted * * *."

He continued:

> "Between 5000 and 6000 cases were dealt with during Federal control by these three Boards * * *. Only ten cases had to be carried to the Director General for decision."

The practice was continued in substantially the same form under the Transportation Act of 1920. Regional Train Service Boards of Adjustment covering the four "operating" crafts were established under § 302 of the Act by agreements between the carriers and the four train service Brotherhoods. These agreements again recognized, and required as a condition precedent to submission to the Boards, the exhaustion of conferences between the *representatives* of the respective railroads and their employees, and again referred to handling in the usual manner by general committees of the employees.[2] Section 303 provided that, in so far as employee invocation was concerned, cases should be heard and decided by such Boards only upon application of the chief executive officers of organizations of employees

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[1] *War History of American Railroads*, p. 157.

[2] See *"Compilation"* handed to the Court in *Washington Terminal Co. v. Boswell* (No. 28, October Term, 1942), pink sheets, pp. 40, 44, 51.

or upon written petition of 100 unorganized employees.[1] The latter method was incorporated in the agreements but was conditioned by the proviso that "no dispute over an interpretation of an existing agreement, rule or practice which has been agreed to or accepted by the management and the duly constituted committee representing the employees parties thereto shall be considered as a dispute under this agreement." This proviso prevented unorganized employees from seeking a decision which would place an interpretation upon the craft rules which had been collectively negotiated.

We add that whatever may be said respecting the intention of the Labor Board in Decision 119[2] to recognize the right of individuals to "present" grievances in person, it appears that they were not entitled individually to present a case to an adjustment board or to the Labor Board itself.

The Railway Labor Act of 1926 carried forward the concept of handling grievances in the "usual manner." The language quoted appeared in § 3 First (c) which provided that the agreements creating boards of adjustment should provide that disputes

> "growing out of grievances or out of the interpretation or application of agreements * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, that the dispute shall be referred to the designated adjustment board by the parties, or by either party. * * *."

The practical interpretation placed upon this provision by those who established such boards is shown in the agreement between the carriers and the train service brother-

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[1] Section 307 placed the same limitations upon resort to the Railroad Labor Board in cases not decided by use of the other machinery provided in the Act.

[2] 2 Railroad Labor Board 87, 96.

hoods creating the new Southwestern Regional Train Service Board of Adjustment in 1928. As in the case of the preceding boards, this agreement (pars. 4, 8 and 10) permitted the cases to be filed solely by the chief executives of the organizations and a corresponding carrier officer.[1]

The differences between the language used in the Railway Labor Act and that employed in the earlier orders and agreements are fully discussed in other briefs *amici* filed herein. We shall not enlarge that discussion. However, we do point out that the provisions of § 3 First (d) of the 1926 Act providing that any agreement establishing an adjustment board "Shall provide that parties may be heard in person," in the setting in which the language was used, obviously relate to the parties to the contract and not to the individuals whose claims are submitted to the board. This, at any rate, was the construction placed upon this provision by those who made use of the Act, as indicated above. And when the same language was incorporated in § 3 First (i) of the present Act the same construction was placed upon it by the First Division.

As to on the property grievance handling, "usual manner" under B. R. T. practice was explained to the House Committee by Vice President Doak of that organization—a member of the committee which drafted the bill—when the 1926 bill was under consideration, as follows:[2]

> "• • • First of all, if a man has a grievance he must submit it to his local lodge and get the majority of the members present at that meeting employed on the division or district where he is employed to sanction it before it can be taken up by his local committee. That is the first thing. Secondly, it is referred to the local committee, and they have a right to amend the grievance or handle it in any way they see fit and report back to the local lodge. The lodge can drop the case

[1] *Compilation*, pink pages 58, 59.

[2] Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 7180, 69th Cong., 1st Sess., p. 203.

> or it may be referred to the General Committee, which Committee consists of the Local Chairman from the respective divisions, who, with the officials of the railway, elect their own Chairman.
>
> It can be handled by that General Committee or thrown out as they see fit. Under this machinery, after it has gone through all this routine, the case can go to the General Manager, or the chief operating officer of the railroad, and with him conferences be held, and if the parties could not agree an appeal to the President may be made, if it is wanted, or to the highest officer of that railroad, before any of the machinery of this bill would be involved. Then if it was a grievance it would go to the Adjustment Board. * * * If it went to the Adjustment Board the decision of that Adjustment Board is final * * *."

This understanding of "usual manner" is corroborated by qualified observers and students of the industry.[1] It is obvious, of course, that this manner of handling was thoroughly understood by the carriers and organizations—which drafted the 1926 bill—and by Coordinator Eastman in 1934.

In summary, it is clear that the function of adjusting employee grievances with a carrier, except in the few instances where individuals undertook to handle their own claims on the properties, has been performed by labor organizations for more than a quarter of a century under governmental and statutory auspices. The machinery provided was geared to this type of handling; it could not have functioned in any other way. Such, we submit, was the established "usual manner of handling" of grievances when the decision of this Court was announced last term.

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[1] See Monograph 17, Railway Labor, of Attorney General's Committee on Administrative Procedure, p. 7 (reprinted in *Compilation*, p. 230). See also Garrison, *The National Railroad Adjustment Board; A Unique Administrative Agency*, *supra*, p. 577.

3. The effect of the Court's decision.

The impact of the Court's decision on the processes of grievance adjustment has already appeared in the suspension of the functioning of the National Railroad Adjustment Board and in indicated difficulties on various railroad properties. It is our conviction that unless this decision be reversed or substantially modified, the prompt and orderly settlement of such disputes will be impeded to a serious degree. The holding upsets long established techniques of grievance handling by employee representatives and adversely affects the administration and enforcement of the collective agreements.

We point out, first, that the Court's decision construes the Railway Labor Act in a way which frustrates the purposes which Congress had in mind in providing for the settlement of grievance disputes.

Congress itself announced its purposes in §2. It singled out the settlement of "all disputes growing out of grievances or out of interpretation or application of agreements" as an objective. And it stated that such settlements should be "prompt and orderly." In view of the importance of this segment of railroad labor relations to the uninterrupted operation of the carriers, it can hardly be doubted that this objective was within the constitutional power or that the means chosen were appropriate to the end sought. Compare *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 553. The congressional committees considering the 1934 amendments to the Act emphasized the importance of grievance settlements in this regard.[1]

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[1] "The most important change in the bill is the creation of what is termed the 'National Adjustment Board'." (Sen. Rep. No. 1065 on S. 3266, 73rd Cong., 2nd Sess., p. 1.)

"The second major purpose of the bill is to provide sufficient and effective means for the settlement of minor disputes known as 'grievances' which develop from the interpretation and/or application of the contract between labor union and the carrier fix-

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Testimony had been received that strikes were threatened because of the accumulation of unadjusted grievances.[1] One of the principal aims of both the 1926 and 1934 bills was to secure more prompt and orderly settlements of such disputes which had piled up into serious proportions. The problem of employee dissatisfaction over unadjusted "log jams" of grievances is a continuing one, as Congress had good reason to know from long experience. We submit that the Act should be interpreted so as to lessen these dangers, not increase them; to facilitate, not hamper, the settlement of such disputes. This, we think, was the clear intent of Congress, as declared in the purposes of the Act and revealed by the circumstances surrounding its adoption.

The current problem of unadjusted grievances has essentially the same effect upon the functioning of the Act as did the situations previously presented to Congress. As we have pointed out, the adjustment of grievances is unavoidably a complex matter of large proportions. It is not too much to say that the resourcefulness of men and management has been taxed almost to the breaking point in an effort to handle the grievance load. And just as a procedure was being developed to lighten the load the

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ing wages and working conditions. * * * Many thousands of these disputes have been considered by Boards established under the Railway Labor Act, and the Boards have been unable to reach a majority decision and so the proceedings have been deadlocked. These unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce in order to secure an adjustment. This has made it necessary for the President of the United States to intervene and establish an Emergency Board to investigate the controversies. This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service." (H. Rep. No. 1944, 73rd Cong., 2nd Sess., p. 2.)

[1] See testimony: Hearings before Senate Committee on Interstate Commerce on S. 3266, 73rd Cong., 2nd Sess., pp. 17, 33; Hearings before the corresponding House Committee on H. R. 7650, 73rd Cong., 2nd Sess., pp. 46-47, 81; Hearings before House Committee on H. R. 7180, 69th Cong., 1st Sess., p. 12.

Court's decision was found to be a barrier to further progress. The shutting down of the Adjustment Board because of the difficulty or the impossibility of securing authorizations is only one development of the decision. We are advised that some managements are insisting that local chairmen furnish powers of attorney in day to day adjustments. Considering the various factors involved, such as the volume of the grievances, the extra burden placed on the committees, and the additional delays which would be encountered, the task of compliance with the technique required by the Court's decision seems calculated to cause a breakdown of grievance handling by employee representatives. It is obvious that handling by individuals or on an individual basis will not work. Such a breakdown, or even the impairment of collective handling as traditionally practiced, will be serious, as prior history shows.

But we do not think that Congress intended its machinery to be applied that way. As pointed out, the Railway Labor Act was designed as an instrument of government for an industry which was largely self-governing. The statute was not to be legalistically construed. The 1926 Act was fashioned by men accustomed to the traditional processes of railroad labor negotiations who knew what would be practical in dealing with each other.[1]

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[1] Mr. Alfred P. Thom, speaking of the labor-management conferences which produced the 1926 bill, stated:

"And I wish to call attention to the fact that the conferences to which I have alluded were conferences of principals, not of their representatives. It was a conference not of lawyers but of the men who were charged on the side of the executives and on the side of the labor leaders with the duty of furnishing transportation to the American people, and who were practically in touch with the relations between the employees and the carriers, who had for years been dealing with that problem, and a *mere lawyer view of the question was with purpose kept out of the matter.* In fact, I may say at this point that when these principals got through and presented their work to Mr. Richberg and

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The 1934 Act did not depart from this atmosphere, although it did, of course, supply compulsions where needed and make clear the doctrine of majority rule among employees. We think Congress intended to preserve and continue what had been the "usual manner of handling" the settlement of such disputes and to approve the role played for so long by labor organizations in that function.

The instant case is a good example of how we believe Congress intended the Act to be applied. The record shows the accumulation of a docket of some 61 E. J. & E. cases, many of which were pending before the Adjustment Board. Among them were respondents' grievances. The agreement of October 31, 1938, disposed of those cases (R. 16-23). It secured relief to respondents in the application of the starting time rule. The Brotherhood then filed the second case with the Board to procure a complete decision on respondents' claims, and the entire docket was duly cleared.

Second, the decision impairs the functioning of employee representatives under the Act, and has an adverse effect upon the maintenance of craft agreements. Representatives of employees have the statutory right and duty (1) to confer with management respecting *all* disputes (§2 Second) and specifically those arising out of grievances or out of the interpretation or application of agreements (§2 Sixth); and (2) to represent a craft or class for the purposes of the Act (§2 Fourth). The latter, of course, includes the right to negotiate craft agreements. Em-

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to me I was told, and I do not doubt that he was told, that the lawyers must be good in this matter now; that here was what the principals wanted; that this was what they were willing to stand for; and *no legalistic view must be permitted to intrude for the purpose of destroying what the principals had done.*" (Emphasis supplied.) (Hearings before House Committee on H. R. 7180, 69th Cong., 1st Sess., p. 113.)

ployees, acting through representatives, have the right to make and maintain agreements and to settle *all* disputes (§2 Fourth, §1 First). These provisions, we believe, spell out collective bargaining rights with which the Court's decision interferes.

The majority opinion largely rests in differences found to exist between "major" and "minor" disputes and in their statutory treatment. The result is that whereas the majority representative is acknowledged to have exclusive control over the disposition of the former, individuals are given the final "say" over those of the second named class. Differentiation is made between collective bargaining and individual rights, and the prospective and retrospective nature of the two kinds of disputes. Such a construction of the Act, we believe, is unwarranted and has unfortunate consequences in the practical operation of the statutory plan.

It is commonly acknowledged that the settlement of and decisions upon grievances of the character involved here have an important bearing upon the administration of the collective agreement and the interests of the employees as a class.[1] Each decision upon a claim affects the fate

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[1] The Mediation Board has stated:

"After a craft or class of employees has established its right to have a collective-bargaining representative and this representative secures an agreement with the management respecting hours, wages, and working conditions, its next important function is to effect compliance with the terms of the agreement. * * * The function discharged by the Adjustment Board [and also that accomplished by on the property settlements] is necessary to the effective day to day observance of labor agreements, for if either party may violate the terms of such contracts with impunity, the agreements become meaningless. * * * (Sixth Annual Report, pp. 48-49).

The source materials on this subject are fully gathered in Weyand, *Majority Rule in Collective Bargaining*, 45 Col. L. R. 556 and in note 1 of the United States' brief herein.

of subsequent analogous claims.[1] Settlements made contrary to the "recognized interpretation" of the collective representative undercut the "maintaining" of the agreement. Improvident settlements have the same effect. Without the skilful and persistent protection of employee representatives the benefits of the contract to the craft would soon be frittered away in the unequal contest of individuals with management. As said by this Court in another connection "what was made collectively could be promptly unmade individually." *Order of Railroad Telegraphers v. Railway Express Agency,* 321 U. S. 342, 346. Such, we submit, is the inevitable result if the degree of control over grievance settlements given to individuals by the Court is permitted to remain.

The weight attached by the majority to the distinction between bargaining for the past and the future appears to be unsupportable. The statute does not refer to this differentiation. We find no basis for its application in the conduct of grievance handling as practiced in the industry. For perhaps fifty years the Brotherhoods have been handling and settling grievances without reference to whether they related to the past or to the future.[2] In many

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[1] The National Railroad Adjustment Board has repeatedly recognized this fact. In the following illustrative decisions of the First Division, the awards were based upon the following findings:

Award No. 534. "The settlements made under the rules involved support the employees' contention."

Award No. 571. "Under settlements on this property claim is supported."

Award No. 837. "On the basis of previous settlements by the carrier in connection with the rule in question, the employees' contention in this particular case is supported."

Award No. 4992. "The prior settlements on this railroad, involving similar claims, warrant an affirmative award."

[2] This distinction likewise does not appear to have been recognized in the settlement of "major" disputes. Many wage agreements which have retroactive effect are reached through collective bargaining. As an example see the report of the Emergency Board appointed by the President May 31, 1943, pursuant to Executive Orders Nos. 9172 and 9299. Thus, collective bargaining is not always prospective.

situations, as the majority recognize, grievance disputes relate both to the past and to the future, as in the case at bar. In all instances, even though in varying degrees, their disposition is of concern to other members of the craft. Such claims may become part of an accumulation which only collective handling can adjust, as here. When they are sustained by the Adjustment Board collective bargaining is often necessary for their collection. To attempt to separate them into two classes, one to be handled individually and the other collectively, would only add confusion. In short, the distinction drawn by the Court, while falling into a convenient legal category, appears to be too technical[1] for application in the light of the situations presented and the effect it would have on long established practice.

Third, a large measure of relief from the frustrating effect of the Court's decision will be given if the statute be construed as conferring upon the craft representative authority to handle and settle grievance disputes of individual members of the craft and to submit them to the Adjustment Board, at least unless and until the individuals involved prior to settlement or disposition take seasonable measures to handle their individual grievances otherwise. There has been much discussion at bar over the issue of whether the statute confers upon the duly designated representative of a craft or class exclusive authority to handle grievance disputes for the members of such craft or class. We confine our attention to the question of whether individuals have the right under the Act to void the result of the action taken by the representative of their craft in settling their claims and submitting them to the Adjustment Board under the circumstances presented here. We believe they may not do so. This is because we consider that at

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[1] See footnote p. 25, *ante*.

least until notice is seasonably received from such employees of their desire to handle such grievances differently, the Act contemplates that the craft representative may perform these functions for them as part of the "usual manner" of handling. The argument in the brief of the United States as *amicus curiae* generally supports this position. It does not appear to require further development here.

CONCLUSION.

In the light of the matters herein discussed, we urge the Court to reverse or appropriately modify its holding that proof of authority from individual employees is required by the Railway Labor Act to empower the duly designated representative of the craft or class of such employees to settle the grievance disputes of such employees or to submit them to the National Railroad Adjustment Board, to the end that such representatives may handle such matters to a conclusion in accordance with the long established practice in the railroad industry.

Respectfully submitted,

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APPENDIX I.

Award No. 9231
Docket No. 13249

FIRST DIVISION

NATIONAL RAILROAD ADJUSTMENT BOARD

39 S. LaSalle St., Chicago 3, Illinois

The First Division consisted of the regular members and in addition Referee James H. Wolfe when award was rendered.

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

WABASH RAILROAD COMPANY

Statement of Claim: Claim of Engineer T. P. Kane and Fireman F. H. Mueller, Decatur Division (11th District) for eight hours at yard rate of pay, account of performing switching at Keokuk, Iowa, in addition to other allowance for the trip May 19, 1940, and this and all other road crews required to perform switching at Keokuk, subsequent to May 19, 1940, be paid minimum yard day.

Employes' Statement of Facts: Engineer Kane and Fireman Mueller were called for train No. 3 at Bluffs, Ill. on May 19, Engine 576, for 8:30 A. M. reporting for duty at 8:10 A. M. departed Bluffs 9:35 A. M. Arrived Keokuk, Iowa, 1:40 P. M. Departed Keokuk on train No. 12 at 2:20 P. M. Arrived switch connection at Bluffs 6:40 P. M. round house 7:00 P. M. Off duty at 7:30 P. M., total time on duty 10 hours and 40 minutes. Upon arrival at Keokuk on May 19, Engineer Kane and his fireman were required to put away and make up their own train. Keokuk is the north terminus on the 11th District, the line between Bluffs and Keokuk. Trains Nos. 3 and 12 are mixed trains, crews assigned receive the local freight rate of pay, and operate on a turn around basis from Bluffs to Keokuk and return. Yard engines are maintained at Keokuk every

day in the week except Sunday. Yard engine crews put away No. 3 and make up No. 12 train on days that yard engines are working. May 19, being on Sunday, and no yard engines maintained, Engineer Kane and his fireman were required to perform switching that is usually done by yard crews. Made claim for an 8 hour day at yard rate of pay, in addition to other allowance for the trip which was declined.

Position of Employes: The claim of Engineer Kane and Fireman Mueller is based on Paragraph C, Article 3, Paragraph B, Article 7, Paragraph A, Article 21, Schedule Lines West of Detroit reading:

"ARTICLE 3

(C) 100 miles or less, 8 hours or less (straight-away or turn-around) shall constitute a day's work in all local or way freight service; miles in excess of 100 to be paid for at mileage rates provided; overtime to begin when the time on duty exceeds the miles run divided by 12½. Overtime shall be paid for on the minute basis at an hourly rate of three-sixteenths of the daily rate, according to class of engine or other power used."

"ARTICLE 7

(B) Eight hours or less shall constitute a day's work."

"ARTICLE 21

(A) Road and helper enginemen in freight service will not be required to do switching at their initial or final terminal where switch engines are located. Doubling trains from one track to another, set out bad order or no-bill cars, will not be considered switching unless time consumed is more than 30 minutes, in which case it will be paid for at overtime pro rata rate, with a minimum of one hour."

The Committee also desires to call the Board's attention to N. R. A. B. First Division, Award No. 3633, which further supports the claim.

This case has been handled in conformity with the Railway Labor Act as amended and is hereby being transmitted to your Board for hearing and decision.

Oral hearing is not requested unless done so by the carrier.

Carrier's Statement of Facts: With reference to that part of the Committee's ex parte statement of claim reading as follows:

> "• • • and all other road crews required to perform switching at Keokuk, subsequent to May 19, 1940, be paid minimum yard day."

No claims of the same character (as the alleged claim of Engineer T. P. Kane and Fireman F. H. Mueller on May 19, 1940) for Engineer T. P. Kane and Fireman F. H. Mueller on subsequent dates, or for other Decatur Division engineers and firemen on subsequent dates, have been handled with the Carrier and submitted to the National Railroad Adjustment Board in accordance with the provisions of the Railway Labor Act as amended June 21, 1934, and, therefore, such claims are not properly before or subject to a decision by the Board, and, accordingly, the only claim before the Board is the alleged claim of Engineer T. P. Kane and Fireman F. H. Mueller "for 8 hours at yard rates of pay, account of performing switching at Keokuk, Iowa, in addition to other allowance for the trip May 19, 1940."

Subject to and without waiving the foregoing objections, the Carrier makes the following statement on the merits of the alleged claim of Engineer T. P. Kane and Fireman F. H. Mueller for 8 hours at yard rates of pay on May 19, 1940.

Engineer Kane and Fireman Mueller were assigned on the engineers' and firemen's extra board, and on the date in question were filling temporary vacancy as engineer and fireman on Trains Nos. 3 and 12 operating daily in turn-around local freight service on the Keokuk Branch

from Bluffs, Illinois to Keokuk, Iowa and return, distance 77 miles in each direction, with home terminal at Bluffs.

Trains Nos. 3 and 12 were scheduled to operate as follows:

Train No. 3

Leave Bluffs 8:15 A. M.—Arrive Keokuk 1:30 P. M.

Train No. 12

Leave Keokuk 2:30 P. M.—Arrived Bluffs 6:50 P. M.

Yard assignments are not and never have been maintained by this carrier at Keokuk, however, at the time of this claim, and for several years prior thereto, the Rock Island Railroad operated one yard engine at Keokuk which was assigned to work from 10:30 A. M. to 6:30 P. M. daily, except Sunday, and under this arrangement the Wabash switching at Keokuk, including service incidental to and in connection with putting train No. 3 away on arrival and making up train No. 12 prior to departure, was performed by the Rock Island yard crew 6 days per week from Monday to Saturday, both inclusive. On Sunday the road crew assigned to trains Nos. 3 and 12 between Bluffs and Keokuk and return were required to put away their own train on arrival at Keokuk and make up their train prior to departure from that point.

On May 19, 1940, which was Sunday, Engineer Kane and Fireman Mueller reported for duty on Train No. 3 at Bluffs at 8:10 A. M., and arrived at Keokuk at 1:40 P. M. with 11 cars, all of which were set out on the bluff track regularly used for setting out cars arriving at Keokuk in this train. Prior to departure from Keokuk on Train No. 12 the road crew were required to make up their own train, which consisted of picking up 8 cars standing on two parallel tracks, i.e., 4 on the Cooper track and 4 on the C. B. & Q. transfer track, which were doubled on to the caboose of Train No. 12. Train No. 12 departed from Keokuk at 3:05 P. M. and arrived at Bluffs where the

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engine crew were relieved from duty at 7:20 P. M., total time on duty 11 hours and 10 minutes.

For the service performed on this trip Engineer Kane and Fireman Mueller submitted one time report claiming 154 miles at local freight rates, and submitted a supplemental time report claiming an additional day at yard rates for service performed at Keokuk from 1:40 P. M. to 2:10 P. M. putting away Train No. 3 and making up Train No. 12. Engineer Kane and Fireman Mueller were allowed 154 miles at local freight rates, or continuous time from the time they were required to report for duty at Bluffs at 8:10 A. M. to the time they returned to that point and were relieved from duty at 7:20 P. M., as they were in branch line turn-around local freight service, and, accordingly, were subject to the provisions of the agreement covering rates of pay, rules and working conditions for engineers and firemen in that class of service.

Article 3, Paragraphs (A), (B) and (C) of the Schedule for Engineers and Firemen reads as follows:

> "(A) For local or way freight service, 52 cents per 100 miles or less for engineers and 40 cents per 100 miles or less for firemen shall be added to the through freight rates, according to the class of engine; miles over 100 to be paid for at the mileage rates provided."
>
> "(B) The local rates where now applied on branch runs will be as stipulated in Paragraph 'A.'"
>
> "(C) 100 miles or less, 8 hours or less (straight-away or turn-around) shall constitute a day's work in all local or way freight service; miles in excess of 100 to be paid for at mileage rates provided; overtime to begin when the time on duty exceeds the miles run divided by 12½. Overtime shall be paid for on the minute basis at an hourly rate of three-sixteenths of the daily rate, according to class of engine or other power used."

Article 21 of that agreement reads as follows:

> "(A) Road and helper enginemen in freight service will not be required to do switching at their initial

or final terminal where switch engines are located. Doubling trains from one track to another, set out bad order or no-bill cars, will not be considered switching unless time consumed is more than 30 minutes, in which case it will be paid for at overtime pro rata rate, with a minimum of one hour.

INTERPRETATION:

It is the intent of this paragraph that any switching other than the exceptions made, will be paid for with a minimum of one hour at pro rata rate. Switching done as per Paragraph 'A' will be counted in the accumulative time as per Article 2, Paragraph 'U,' providing time consumed is less than 30 minutes.

(B) Enginemen required to do switching at terminal station where no switch engine is maintained or available, will be paid for such service at overtime pro rata rate on a minute basis with a minimum of one hour. This is not intended to apply to local freight or branch train runs required to do their own station switching or to make up or put away their own trains. Terminals are points where the runs begin and end. The turning point on a turn-around run shall be considered as an intermediate point on a continuous run."

Article 40, Paragraph (A) of that agreement reads as follows:

"(A) Excepting payments under rules applying to work performed at initial and final terminals, and to final terminal delays, all arbitraries and special allowances applying to road service other than passenger, under rules, regulations, or practices, which conflict with the payment of single time, in miles or hours, from the time required to report for duty until released from duty at the end of the trip shall be eliminated.

On roads where no rules are in effect covering work performed at terminals, the practices in regard to the character of work permissible or duties required at terminals are not to be extended."

and Article 27, Paragraph (A) of that agreement reads as follows:

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"(A) Time of road enginemen will begin not less than 20 minutes prior to the time for which they are called and will end 20 minutes after placing engine on designated track, when engine crew will be considered released."

Position of Carrier: The alleged claim of Engineer Kane and Fireman Mueller for 8 hours at yard rates of pay account of putting away and making up their train at Keokuk on May 19, 1940 is without foundation under the rules of the Schedule for Engineers and Firemen, Lines West of Detroit and Toledo, effective December 1, 1919.

As shown by the Carrier's Statement of Facts, Engineer Kane and Fireman Mueller were in turn-around local freight service operating on the Keokuk Branch from Bluffs to Keokuk and return to Bluffs, and while in that service were subject to the provisions of the schedule applicable to engineers and firemen in turn-around local freight service.

Article 21, Paragraph (A) contains no provision for the allowance of 8 hours at yard rates to engineers and firemen under any circumstances. That rule provides—

1. that enginemen in freight service will not be required to do switching at their **initial or final terminal** where switch engines are located; and

2. that when engineers and firemen perform more than 30 minutes switching at such terminals they will be paid therefor at pro rata rate, with a minimum of one hour.

In view of the fact that Keokuk, the point where the service in question was performed, was neither the initial nor the final terminal, but was the turning (intermediate) point on the run, it is obvious that the provisions of Article 21, Paragraph (A) do not support the contention of the Committee in the case under consideration. In that connection, attention of the Board is also invited to that part of Article 21, Paragraph (B), previously quoted, reading as follows:

> "Terminals are points where the runs begin and end. The turning point on a turn-around run shall be considered as an intermediate point on a continuous run."

In addition to the fact that Article 21 only provides for additional compensation (but under no circumstances a day at yard rates) to engineers and firemen when required to perform switching at **terminals**, and in the case under consideration Keokuk was, under the specific language of Article 21, Paragraph (B), an **intermediate point** on a continuous run, attention is invited to the following language also contained in that rule:

> "This is not intended to apply to local freight or branch train runs required to do their own station switching or to make up or put away their own trains."

As previously stated, engineers and firemen in road service are subject to the rules of the schedule applicable to engineers and firemen in that class of service, and when required to perform service at intermediate points, as was done in the case under consideration, they are not, under those rules of the schedule, entitled to additional compensation, as such allowance would conflict with the payment of single time, in miles or hours, from the time required to report for duty until released from duty at the end of the trip, as provided by Article 40, Paragraph (A) of the schedule, quoted in Carrier's Statement of Facts.

Attention of the Board is invited to Decisions Nos. 120, 618, 619 and 784 of the Southwestern Regional Train Service Board of Adjustment, wherein it will be noted that claims were not presented for road crews account of being required to perform switching at the point involved in those decisions, which is conclusive evidence that it was understood by the parties that road freight crews are not entitled to additional compensation for service performed under the circumstances existing in the case under consideration where all service performed by the road crew at Keokuk was in connection with their own train, i.e., setting out their cars on arrival and picking up their cars prior to departure.

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The foregoing conclusively shows that—

1. The alleged claim of Engineer Kane and Fireman Mueller for 8 hours at yard rates on May 19, 1940 is without foundation under the rules of the Schedule for Engineers and Firemen;

2. Keokuk was an intermediate point for the turn-around local freight run on which Engineer Kane and Fireman Mueller performed service on the date in question, and the rules of the Schedule for Engineers and Firemen do not provide for any additional compensation to engineers and firemen in road service when required to perform switching at intermediate points;

3. Yard engines are not and never have been maintained by this carrier at Keokuk, however, as previously stated, at the time of this claim and for several years prior thereto, the Rock Island Railroad operated one yard engine which was assigned to work from 10:30 A. M. to 6:30 P. M., daily, except Sunday, and on May 19, 1940, which was Sunday, the Rock Island yard engine was not assigned to work;

4. All service performed at Keokuk by Engineer Kane and Fireman Mueller on May 19, 1940 was in connection with their own train;

5. The principle involved in this alleged dispute was definitely and finally disposed of in previous decisions of the Southwestern Regional Train Service Board of Adjustment, at which time it was recognized by the employes that road crews were not entitled to any additional compensation under the circumstances existing in the case under consideration;

6. The alleged claim referred to herein could only be sustained by a complete disregard of—

(a) a binding agreement between the carrier and its employes represented by the Brotherhood of Locomotive Engineers, and the Brotherhood of Locomotive Firemen and Enginemen;

(b) binding decisions of the Southwestern Regional Train Service Board of Adjustment which definitely and finally disposed of the principle involved in this alleged dispute;

(c) the sanctity of the agreement between the carrier and its employes;

(d) the fact that the National Railroad Adjustment Board has no legal right to impose on the parties or on either party new rules;

(e) Section 6 of the Railway Labor Act as amended June 21, 1934.

In view of the above facts it is obvious that the contention of the Committee should be dismissed and the alleged claim denied.

The carrier affirmatively states that all matters referred to in the foregoing have been discussed with the Committee and made a part of the particular question in dispute.

Oral hearing is requested.

Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute waived hearing thereon.

Keokuk is the turnaround point for engine crews manning trains No. 12 and No. 3 and, by Rule 21 (B) Enginemen's Schedule, an intermediate point. At this point the Rock Island Railroad operated one yard engine which did one trick daily except Sunday and under arrangement with the Wabash the switching at Keokuk, including making up and putting away of trains No. 12 and No. 3 respectively was done on all days except Sunday. On May 19, 1940, a

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Sunday when no switching crew was on duty, enginemen on turnaround run put away their own train No. 3 on arrival and made up their own train No. 12 prior to departure, for which they claim a yard day. In Award 3110 it was said "In scores of cases * * * this Division has held that yard work **as to which seniority is held by yardmen** cannot be taken away from them and turned over to roadmen to perform. Whether it be so expressly stipulated in the Schedule or not, is not controlling **as such would necessarily be implied if not expressed** since work is the very subject matter of the contract with the yardmen, and to hold it to be the prerogative of one party to the contract to destroy the subject matter of it would be to hold that no contract exists." (Emphasis added.) In Award 7192 it was stated: "The rulings which give roadmen the right to collect for yard work even though the intrusion is slight stems from the principle of seniority. The preference right of men in a craft [or class] to do the work of that craft [or class] according to the length of service results in the corollary that all men of that craft may exclude outsiders having no rights of seniority from positions in the field in which the craft [or class] operates, and this principle has apparently been extended to prevent roadmen from not only taking yard positions when they hold seniority, but from doing for the most part any work which is yardmen's work." It is a fair intendment from the record that the Rock Island yardmen held seniority at Keokuk. This was an encroachment by the Wabash enginemen on the seniority rights of these Rock Island yardmen.

It is contended, however, that this is not a yardman's claim and that since enginemen on the Wabash have Division seniority covering the entire division, there is no encroachment on rights of Wabash yardmen because no Wabash yardmen were employed. But the principle enunciated in Award 7192 and numerous other awards prior and subsequent thereto does not apply only to the members

of another craft belonging to the same railroad but extends to a case where an employe of one railroad is required by order to encroach on the occupational domains of another craft or class which has, through contract with another railroad, carved out that work for itself. In Award 4923 this Board speaking through a Referee, denied an award where the road crew of one line was required to do switching on a foreign line, saying: "it cannot be said that yardmen of the carrier (the carrier against which the award was sought) were deprived of any work by requiring road crews to do the switching involved." In that Docket 7195 the owner carrier did the switching for the tenant carrier, while in this case the Rock Island did the switching for the Wabash. But it is submitted that the Referee in Award 4923 ran counter to the principle which he had, through many awards, helped to establish. And this principle thoroughly established throughout the whole railroad industry remains the same whether, as was said in Award 3633, the payment exacted is compensation for a service performed by employes who did not contract to do it but were required to do it or whether, as was said in Awards 7231 to 7239, that it has both the aspect of compensation or a penalty—compensation as far as the employe doing it is concerned—and a penalty imposed on the carrier as a deterrent from not repeating the violation. A penalty is punitive, not compensatory. Whether the payment is exacted by way of compensation for work done or by way of a penalty or both, it is now thoroughly established in the industry that where yardmen contract for the work, they alone are entitled to perform it.

The claim is for "this and all other road crews required to perform switching at Keokuk subsequent to May 19, 1940."

The carrier contends that "no claims of the same character" have been processed on the property and hence that such claims "are not properly before or subject to a decision by the Board."

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Section 3 (i) of the Amended Railway Labor Act provides: "The **disputes** * * * growing out of grievances or out of the interpretation or application of agreements * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such dispute; * * *." (Emphasis added.) It will be noted that the act does not specify that each claim shall be handled in the usual manner. Many claims affecting many different claimants may reflect one dispute growing out of a single grievance or out of the same difference of opinion as to the interpretation or application of certain rules. A dispute arises by virtue of a difference of opinion as to the applicability or interpretation of certain rules as related to a certain fact situation. Where certain named claimants make claims under a definite fact situation for certain named dates there is of course no difficulty. It is thought that there should be no difficulty where the same named parties alleged that on subsequent but unnamed dates exactly similar violations were committed **as to them** because there was a repetition of the identical fact situation which it is claimed constituted the violations. When the claim includes a demand for reparations for unnamed claimants at subsequent unnamed times, the case becomes more doubtful because of the uncertainty that the fact situations regarding all the unnamed parties are the same and hence whether they involve the **same** dispute which the carrier has the right under Section 3 (i) of the Railway Labor Act to have handled on the property. When the carrier objects for the reason that the instances sought to be included in the claim are such that, on examination, show variations in the factual situation which may take them out of the bounds of the particular dispute presented, it would seem that the carrier should have the right to have those fact situations presented to it in order to determine whether they involve the same dispute. But where it is apparent that the fact situation was such that it could involve only the single dis-

pute in issue, there would seem to be no reason why parties and dates easily ascertained should not be included. A good example is Board Award 2871 where there could have been no question but that all the parties on the third trick were started 59 minutes too late on the rule for continuous shifts. The Board in many cases seems to have consciously or unconsciously followed this differentiation in certain of the awards. Thus in Board Awards 6725, 6748 and Referee Awards 2145, 2707, 3040, 3320, 3828, 5423, 6627, the situations were such as not to involve a mere repetition of exactly the same fact situation although some of them would seem to very nearly approach such case. In Referee Award 5191, involving pay for lunch periods, a class recovery was disallowed although it would seem that the unnamed parties at each subsequent time would fit exactly the same fact mold. In Board Awards 2517, 2521, 2871, 3385, 5921, 6799, apparently unnamed parties who fell in the class affected were permitted to recover. Here again in Awards 2521, 2871, 3385 and 6799, the identical acts or omissions alleged to constitute the infractions affected every one in a group or the act or omission although not affecting all equally in a group were simple and uncomplicated and were identical as they affected successive individuals. That, however, is not so apparent as to the fact situations involved in Award 2517. It, therefore, cannot be said that the line of demarcation between those Board and Referee Awards which allowed and those which disallowed unnamed parties to recover for infractions alleged to have occurred at unnamed subsequent dates was altogether along the line of whether the fact situations were such as to constitute identical repetitions (in which case the award would take on the aspect of an interpretation) or so similar as to amount to an identical repetition of the same transaction or whether the fact situations attempted to be encompassed under the same dispute may have varied sufficiently to embrace new facts which might have given rise to another dispute or perhaps, if

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accurately known, might involve no dispute at all. Certainly where new facts were added to the claim as submitted to the Division which would make a new dispute not handled on the property or where it is likely that claims for unnamed parties may not be based on identical or closely similar fact situations so that the carrier should have been permitted to pass on them, the Awards properly held it down to the situation as presented on the property. See Awards 3385—3212, 4007 (allowed only from date the particular ground on which award was based was brought to the attention of the carrier), 4519-5668-6964.

The upshot of the whole matter is therefore that when it is clear that claims of unnamed individuals although for even and subsequent dates are based on fact situations identical with that of the named claimant so as to definitely apprise the carrier that they are within the confines of the particular dispute reflected by the claim, there is no reason why claims involving the same dispute should be multiplied in the field or before this Board. Economy of effort and time and filing space both in the field and in this Division demand otherwise. But if the situation is such that it cannot be clearly discerned that the factual basis of the claims of the unnamed parties fall within the dispute raised by the claim of the named parties so that the carrier may know that he is giving his decision on one definite question, this Division, especially on objection of the carrier, should confine its findings to the instances where it is convinced that the factual basis of all claims passed upon gives rise to the same dispute and the carrier was apprised of it.

The fair intendment of the claim filed in this case asking that "this and all other road crews required to perform switching at Keokuk subsequent to May 19, 1940, be paid minimum yard day" was to cover only situations where the road crews did the work of putting away and making up their own trains on Sundays when the Rock Island yard crew was not on duty. The carrier shall check for all such

instances respecting Wabash engine crews after May 19, 1940, and make payment accordingly.

AWARD

Claim sustained per Findings.

By Order of First Division
National Railroad Adjustment Board
Attest: (Sgd.) T. S. McFarland
Secretary

Dated at Chicago, Illinois, this 6th day of April, 1944.

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IN THE

Supreme Court of the United States

Office of Supreme Court, U. S.
DEC 3 1945
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1944

No. 160

ELGIN-JOLIET AND EASTERN RAILWAY COMPANY, a Corporation,
Petitioner,

v.

G. W. BURLEY, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CERTAIN AFFILIATED ORGANIZATIONS AS AMICUS CURIAE ON REARGUMENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 160

ELGIN-JOLIET AND EASTERN RAILWAY COMPANY, a Corporation,
Petitioner,

v.

G. W. BURLEY, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CERTAIN AFFILIATED ORGANIZATIONS AS AMICUS CURIAE ON REARGUMENT.

OPINIONS BELOW

The opinion of the court below (R 110-113) is reported in 140 F. 2d 488. The district court's opinion is not officially reported but appears at R. 80-84; its summary judgment may be found at R. 99-100.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 2, Paragraph Fourth of the Railway Labor Act, confers the power on the union chosen by a majority of the employees in a craft or class, to contract on behalf of each employee in the craft or class in the adjustment of grievances and to act on behalf of each employee in submitting to the National Railroad Adjustment Board such grievances as are not adjusted in conference on the property.

STATUTE INVOLVED

The statute involved is the Railway Labor Act, as amended in 1934, 48 Stat. 1185, 45 U.S.C., Section 151, *et seq.*

STATEMENT

On November 19, 1940, Burley and 23 other employees of petitioner † brought a suit in the district court of the United States for the Northern district of Illinois, Eastern division, in which they alleged that petitioner had failed to observe the starting time provisions of a collective labor agreement between petitioner and the Brotherhood of Railroad Trainmen and by reason of such failure "in accordance with the established practice among railroads and employees thereof" these employees became entitled to pay "for an additional day at time and one-half, at the regular daily rate from August 26, 1934 to and including November 14, 1938" for each day they had been required to work (R. 3-6).* Petitioner filed a motion to dismiss in which it alleged that on October 31, 1938, the Brotherhood of Railroad Trainmen entered into a written compromise agreement with petitioner relating in part to the dispute respecting starting time set forth in the complaint and that on September 6, 1940 the National Railroad Adjustment Board by order of the First Division had held this compromise agreement a bar to any recovery on the claim (R. 9-10). The motion to dismiss was supported by an affidavit to which copies of the proceedings before the National Railroad Adjust-

† The record does not disclose whether there were any other employees in the craft or class at the times here mentioned.

* The "practice" here involved has been described as follows: "To the newcomer to the field one of the most interesting types of cases concerns the application of the so-called 'arbitraries' and special allowances and penalties. Extreme examples of these are the 'starting-time' rule and the 'yard-road' rules. If the rule prescribes that starting time shall be 8 o'clock, and the crew is supposed to work eight hours, the crew may get paid for 20 hours if it starts to work at 7:30 and works 8 hours. The theory of this is that the period from 7:30 to 8:00 is a part of a different working day; an 8-hour day is guaranteed and, therefore, for the different working day 8 hours' pay is due; but since all of the work is within a 24-hour period, one 8-hour period calls for pay at the rate of time and a half, or 12 hours, and those 12 hours added to the other 8 hours make a total of 20 hours." Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, Railway Labor, Senate Doc. 10, Pt. 4, 77th Cong., 1st Sess., p. 3.

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ment Board were attached as exhibits (R. 11-39). The complaining employees filed a motion to strike the motion to dismiss on the ground that it set up new and additional evidentiary matter not proper in such a motion (R. 41). Thereafter petitioner filed a motion for summary judgment (R. 42). The complaining employees opposed this motion alleging that the Brotherhood was not authorized by its constitution and by-laws and they had never specifically authorized it to enter into any agreement compromising claims of the complaining employees for damages for violation of Article 6 nor to prosecute claims before the Adjustment Board for such damages but that the Brotherhood's authority was limited "to prosecuting a complaint before the Board to compel the defendant to comply with Article 6" (R. 43-45). This opposition was supported by affidavits to which were attached the constitution and by-laws of the Brotherhood (R. 45-61).

The district court on February 10, 1941, rendered an oral opinion (R. 80-84) and on February 20, 1941 by summary judgment dismissed the suit (R. 84-85). Upon appeal this decision was reversed by the Circuit Court of Appeals for the Seventh Circuit upon jurisdictional grounds pertaining to diversity of citizenship, *Alderman* v. *Elgin, Juliet & Eastern Ry. Co.*, 125 F. 2d 971 (C.C.A. 7). Thereafter the complaining employees amended their complaint to eliminate thirteen of the twenty-four plaintiffs and thereby cure the defects as to jurisdiction (R. 96-100). The district court again rendered a summary judgment for petitioner upon the theory that the award of the National Railroad Adjustment Board was conclusive (R. 84-85). Upon appeal the Circuit Court of Appeals for the Seventh Circuit reversed, holding that a summary judgment should not have issued since the pleadings raised an issue of fact as to whether the Brotherhood had ever been authorized by the complaining employees to "negotiate, compromise, and settle their claim for damages for past violations of Article 6" (R. 112-113).

The material facts set forth in the pleadings and annexed exhibits are as follows:

Prior to July 27, 1934, the intra-plant switching at the Standard Oil Company refineries at Whiting, Indiana, was per-

formed by train crews employed by that Company. Beginning on July 27, 1934, and subsequently to date, this intra-plant switching has been performed by petitioner (R. 27). Yard crews employed by the Standard Oil Company prior to July 27, 1934, were ordered to commence work each day at hours fixed in advance by plant management. These hours varied from time to time, according to the demands of manufacturing operations (R. 32-33).

On July 24, 1934, petitioner and the Brotherhood of Railroad Trainmen agreed that their contract of April 1, 1927 should be deemed applicable to the intra-plant switching crews from and after July 27, 1934, but that for a period of time Article 6 thereof, which prescribed a fixed starting time for yard crews, should not be applicable (R. 4, 35-36). The complaining employees contend that there was a verbal waiver of Article 6 for a 30-day period only (R. 4, 27), but that, if it was for a longer period, the verbal waiver was ineffective to alter the terms of a written contract (R. 27-28, 35-36). Article 6 of the contract of April 1, 1927, provides (R. 4):

> (a) Regularly assigned yard crews will each have a fixed starting time and the starting time of a crew will not be changed without at least 48 hours advance notice. Present practice as to the handling of transfer crews is not affected by the foregoing.
>
> No yardman will be required to work more than one (1) assigned period in any twenty-four (24) consecutive hours.
>
> (b) Yard crews shall have a designated point for going on duty, and a designated point for going off duty.
>
> Starting time of yard crews on one, two or three 8-hour shifts will be as follows:
>
> 7 a. m., 8 a. m. and 8:30 a. m.
>
> 3 p. m. and 4 p. m.
>
> 11 p. m, 12 midnight, and 12:30 a. m.
>
> * * *

Article 25 of the contract provides (R. 5):

> Any controversy arising as to the application of the rules herein agreed upon to the Schedule shall be taken up by the local committee and the local officials. In the event of failure on their part to agree upon a satisfactory basis of settlement, the General Committee may take up the question with the General Superintendent, and in the

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event of their failure to agree upon a satisfactory settlement, the committee may appeal to the Vice President.*

The complaining employees were all members of the Brotherhood of Railroad Trainmen on July 27, 1934 and continued to be members through November 15, 1938 (R. 3, 9). Continuously during this period petitioner required them to start work at times other than those fixed in Article 6 of the agreement (R. 5, 27, 31-32). They, "at various and sundry times since August 26, 1934," made demand upon petitioner to observe the terms of Article 6 and they conferred and lodged protests with various officials of petitioner including the local officials, General Superintendent and the Vice President, as required by Article 25 (R. 5).

On November 23, 1936, the Brotherhood of Railroad Trainmen filed a claim against petitioner with the First Division of the National Railroad Adjustment Board for failure to put into effect the starting time as provided in Article 6 (R. 11, 13-14). The statement of claim alleged that petitioner justified its refusal to observe these starting times because petitioner had made "arrangements with the Engineer's Committees that they would be privileged to start the crews at the time that such crews were started while the switching was being done by the Standard Oil Company crews" (R. 13). This claim was assigned Docket No. 3537 by the Adjustment Board (R. 11-12, 14-15).

On October 28, 1938, the President of the petitioner settled 24 cases or grievances between the petitioner and the Brotherhood of Railroad Trainmen, including Adjustment Board Docket No. 3537 (R. 9-10, 12, 16-23, 33-34, 39). The settlement was embodied in a letter, which so far as here material stated (R. 17, 23):

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* This provision in the contract would bind all employees in the unit to a procedure by which their grievances would be settled only by agreement between the carrier and the Brotherhood. The government in its brief completely ignores this contract, although in 40 Op. Atty. Gen. 59 it took the view that such a contract was valid. Moreover, the Government's brief, pp. 8, 45-49, cites letters from members of the National Mediation Board which the government in its brief in *General Committee* v. *Missouri-Kansas-Texas Railroad*, Nos. 23, 27, 41, October Term, 1943, p. 73, note 59, states, no longer represent the views of the Mediation Board on this question. See also brief in the *M-K-T* case, p. 80, notes 67 and 68.

Case No. 5—Labor Board Docket No. 3537—Starting time of switch engines in Whiting S. O. Yard.

Settled by agreement that the starting times for a ninety-day trial period commencing November 15th, 1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employees claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in satisfaction to our employees and to the industry served, then representatives of the Railway Company and representatives of the Yardmen, and representatives of the Engineers and representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry.

* * *

We have by this letter given you a complete resume of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employees whom you represent and have proposed in this letter a very liberal disposition of all the cases involved. The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending either before the board, or under discussion with this office except Case No. 4, which it is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement.

Yours truly,
S. M. Rogers, President

Accepted for the Yardmen Oct. 31, 1938
C. H. Williams, General Chairman, B. of R. T.
S. F. Johnson, Secretary, B. of R. T.

The Brotherhood of Railroad Trainmen thereupon withdrew Docket No. 3537 from the Adjustment Board (R. 24-25).

On April 18, 1939, the Brotherhood filed another claim with the Adjustment Board, Docket No. 7324 asking "for one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in

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the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article No. 6 of the Yardmen's Agreement * * * effective January 1, 1927, and applicable to Whiting (Standard Oil Company) Yardmen, July 27, 1934, from dates of August 27, 1934, until November 14, 1938, inclusive" (R. 69, 79). The petitioner set up the settlement agreement of October 31, 1938 as a bar (R. 53-60). The Brotherhood took the position that the case it settled "held no claims for payment for time. It was simply a case to settle the dispute as to the carrier's right to force the yard crews in the Whiting Yard to work at times other than the fixed starting time provided for in Article 6" (R. 29).

The National Railroad Adjustment Board by Award No. 5048, issued September 6, 1940, denied the claim in Docket No. 7324, because "the evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28, 1938, accepted by employees October 31, 1938" (R. 39).

SUMMARY OF ARGUMENT

I

Collective bargaining, like individual bargaining, is a system for governing industrial relations. The relative economic weakness of employees under individual bargaining results in the vesting of autocratic power over all phases of the employment relationship in the employer. Collective bargaining seeks to democratize the process of governing employment relationships by according to the employees equal voice with the employer in the affairs which concern them both. This democratization is accomplished by substituting, at all times, on the employee side of the conference table, a representative of all the employees for each of the employees alone. Collective bargaining and individual bargaining are antithetical systems; since both operate on the same subject matter it is apparent that the two systems cannot coexist in the same enterprise. The autocratic power exercised by employers under individual bargaining is as evident in the executive and judicial phases of industrial government, i.e., in the enforcement and interpretation of agreements, as in the legislative,

or contract making, phase. Therefore, where collective bargaining replaces individual bargaining as the system for governing industrial relations, an exclusive bargaining representative is substituted for the employees as individuals in the executive and judicial as well as the legislative phases of that government.

Such substitution, in the legislative phase, results in the introduction of mutuality of rights and obligations between employees and employers, as well as in substantive rules more favorable to the employees' interests. In the executive and judicial phase, the substitution results in safeguarding of employee gains; in according them protection against diminution of the employer's obligation through unfair interpretation of agreements and in securing for them adequate redress in cases of violation of the agreement.

Collective bargaining in theory and practice, recognizes a distinction between legislative and justiciable issues. Legislative issues require a determination of what the rules should be. They are issues which, for lack of a mutually accepted standard, must be resolved by trading or compromise. Justiciable issues are those involving the interpretation or enforcement of obligations in accordance with principles already subscribed to by the parties in an agreement. They are commonly dealt with under grievance procedures created by contract between the employer and the exclusive representative. Although such issues are not properly to be decided on the basis of compromise, but rather on the basis of principle, the participation of the exclusive representative in their resolution is indispensable to adequate protection of the interests of the employees as a whole. Since the settlement of a matter involving interpretation or application of an agreement will normally have both prospective and retrospective aspects, and since both aspects invariably affect the collective interest of the entire group of employees, collective bargaining has never distinguished between grievances on the basis of their prospective or retrospective character. By virtue of its rejection of all aspects of individual bargaining, collective bargaining requires the participation of the exclusive representative in place of individual employees in all matters which may be disposed of by agreement between employer and employee.

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The philosophy and practice of the trade union movement, based in large part as it is upon political analogy, adopted the democratic principle of majority rule as the guide for determining when collective bargaining should replace individual bargaining, as well as for determining the identity and policies of the exclusive representative. It relied further on familiar democratic concepts to mark the outposts of legitimate exercise of governmental power by the representative and the rights of individuals and minorities. Among those rights is one, analogous to that guaranteed by the Federal Constitution, which permits individuals and minority groups to voice their views and present their claims to the employer as well as to the exclusive representative, between whom the governmental power is divided.

II

The common law concepts of agency, third party beneficiary, and freedom of contract which were commonly applied by the courts to agreements arising out of industrial relations are incompatible with the hypotheses upon which the system of collective bargaining rests. Collective bargaining could not flourish in a legal climate which presumed that equality of bargaining power existed between employers and individual employees, which treated the bargaining representative as a mere agent to be discarded at the will of each individual employee, and which discerned as the party to contracts executed by such representative, not the representative, but the individual employees. The premise that freedom of contract for employees existed only if the workers acted as one man required that the representative be accorded a status similar to the status of a political representative; that it alone be empowered to contract on behalf of the employees; and that it alone, representing the collective employee interests, be deemed the party to collective agreements. Once these requisites were met further implementation would be required to determine when collective bargaining should be instituted and to set forth the duties of the representative to its constituents.

III

In the Railway Labor Act, as in the National Labor Relations Act, Congress enacted a system of governing employment relationships based on the principles and practices of collective bargaining. In both Acts Congress required employers to recognize that the representatives selected by a majority of the employees have the sole right to contract on behalf of the employees with respect to all matters requiring agreement between employers and employees. While Congress distinguished in the Railway Labor Act between disputes resolvable only by new agreement between employers and unions and disputes resolvable by interpretation or application of existing agreements, the distinction was drawn solely for the purpose of defining the procedures and jurisdiction of the ultimate tribunals available for disposition of the respective types of disputes, and not for the purpose of distinguishing between the powers accorded the exclusive representative with reference to the two types of disputes.

The provisions of the Act make it clear that the statutory representative has exclusive authority to settle with the employer all disputes; those arising over matters of interpretation and application of agreements, as well as those arising over new agreements. The legislative history of the Act shows that Congress rejected suggestions which would have confined the powers of the statutory representatives to contracting with employers respecting legislative matters.

The corresponding provisions of the National Labor Relations Act and their legislative history likewise show that Congress, in creating legal systems appropriate to the development of collective bargaining and adopting majority rule, accepted the view of students of labor relations that exclusive authority to contract on behalf of employees with reference to judicial and executive, as well as legislative matters, must be vested in a single bargaining representative.

The right to present grievances reserved to individuals and minorities under the National Labor Relations Act comprehends no more than the right to voice their views and present their case; it does not comprehend the right to bargain and contract with the employer for the settlement of grievances.

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Sponsors of the proviso to Section 9 (a) which confers this right recognized its counterpart in the Constitutional guarantee of the right to petition the Government for redress of grievances, and made it clear that they did not intend the grant of such a right to be misconstrued to permit individual bargaining with regard to grievances. Indeed, the legislative history of the Act establishes Congressional acceptance of the view that once a collective bargaining representative had been selected by the majority no individual bargaining of any kind is permissible.

Adoption of the principle of majority rule itself stemmed from adherence to the view prevalent in the labor movement that the fixing of terms and conditions of employment was industrial government. In adopting that rule Congress recognized that only unitary dealing with employers through exclusive representatives would comport with the objectives of collective bargaining, and explicitly rejected suggestions which would have diminished the exclusive power of the representative chosen by the majority. In defining the rights of individuals and minorities under majority rule Congress again placed reliance upon precedents drawn from political life. In addition to the advantages derived by individuals from collective action, which would more than compensate for the loss of any theoretical rights they possessed under individual bargaining, Congress accorded them the traditional democratic guarantees of freedom from arbitrary and discriminatory action by the representative, the right to participate in selection of the representative, and the added protection of the right to present grievances.

The protections accorded individuals and minorities under the Railway Labor Act are identical with those accorded them under the National Labor Relations Act. The proviso to Section 2 Fourth of the Railway Labor Act, while it can be construed to permit individuals and minority groups to present their views to the employer on any and all subjects of collective bargaining, including grievances, cannot be construed to permit individual employees to settle grievances by contract with the employer.

The provisions of the Act relating to the disposition of

grievances support this interpretation. Throughout the Act Congress recognized the collective agreement as a bi-party contract between the employer and the exclusive represntative. In creating the National Railroad Adjustment Board to serve as the final repository of judicial power in grievance cases, Congress emphasized its view that governmental power in the industry was divided only between employers on the one hand and unions on the other. It provided that membership on the Board should be equally divided between employers and unions. By permitting employers and unions to supplant the Adjustment Board with grievance tribunals of their own, Congress made it clear that the provisions establishing the Board created no rights which could not be eliminated by agreement between the employer and the statutory representative.

Just as Congress vested in the employer and the exclusive representative alone power to settle grievances in the final stage, so did it vest in them alone the power to settle grievances at earlier stages. This conclusion is supported by the historical practice of collective bargaining on the railroad, the continuation of which was dictated in the Act, as well as by the absence of provision for participation by individuals and minorities in the deliberations and decisions of the employer and the statutory representative. Moreover, the statute confers no right upon individuals to present cases to the Adjustment Board. Clearly, therefore, the right preserved to individuals under the Railway Act with respect to grievances must be only the right to present cases to the employer and not the right to contract with the employer for their disposition.

IV

Decisions of the National Labor Relations Board and of the courts support this view of the power of the exclusive representative under both the Railway Labor Act and the National Labor Relations Act, and the analysis of the rights accorded individuals and minority groups in those Acts. The Board has consistently held that to accord individuals the right to contract with employers concerning the settlement of grievances is incompatible with the statutory scheme for col-

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lective bargaining. And this Court, recognizing that the statutes adopted the philosophy of collective bargaining, has held that on every subject, no matter how exceptional, individual bargaining whether it results in terms better or worse than those which might be obtained by the exclusive representative, was outlawed. The Court has further held that under majority rule in collective bargaining individuals possess the same rights against the repositories of governmental power in industry as they possess in political democracy.

ARGUMENT *

I. THE THEORY AND PRACTICE OF COLLECTIVE BARGAINING AS DEVELOPED IN THE TRADE UNION MOVEMENT EXCLUDES ALL INDIVIDUAL BARGAINING CONCERNING GRIEVANCES.

Collective bargaining is a system for governing employment relations.[1] The system is predicated upon twin hypotheses: first, that effective participation by employees in the resolution of issues affecting their jobs is not only desirable in a democratic society but is indispensable to prevent exploitation of workers by employers; second, that since individual employees, lacking financial strength,[2] experience in negotiations,[3] and

* We respectfully refer this Court to the Memorandum in Support of Petition for Rehearing previously filed in this case by the Congress of Industrial Organizations for a discussion of certain points not dealt with in this brief. (See particularly pp. 9-12, 13-14, 19-21.) Because we wished to discuss the economic, legislative, judicial, and administrative authority on the subject of grievances with some thoroughness, we have refrained from discussing these additional points herein.

[1] Perlman, Selig, and Taft, Philip, *History of Labor in the United States*, 1896–1932 (New York, 1935), p. 10, "The trade agreement . . . is a written constitution by a new type of government, an *industrial government*, established by bargaining as an organized group. . . . the industrial government envisaged by unionism was a highly integrated government of unionized workers and of associated employer-managers, jointly conducting the government with 'laws' mandatory upon the individual employer and employee"; Hoxie, Robert Franklin, *Trade Unionism in the United States* (New York, 1920), p. 255; Catlin, Warren B., *The Labor Problem* (rev. ed., 1935), p. 424.

[2] McCabe, David A. and Lester, Richard A., *Labor and Social Organization* (Boston, 1938), p. 87; Taussig, F. W., *Principles of Economics* (New York, 1936), p. 300; Tead, Ordway, *Instincts and Industry* (New York, 1918), pp. 118–126; Daugherty, Carroll, R., *Labor Problems in American Industry* (New York, 1936), p. 414.

[3] Webb, Sidney and Beatrice, *Industrial Democracy* (London, 1897), p. 181, 843–847; King, William Mackenzie, *Industry and Humanity* (New York, 1918), pp. 235-238; Daugherty, op. cit. *supra*, note 2, p. 413.

knowledge of the economic and technical aspects of industry,[4] are in fact wholly unable to deal on a basis of equality with employers, effective employee participation is possible only through substitution of a single group voice for the voices of the individual employees.[5] These hypotheses require substitution, on the employee side of the conference table, of a representative of all the employees for each of the employees alone.[6] This substitution is accomplished by vesting in the representative all power to settle with the employer questions affecting terms and conditions of employment,[7] which, under the system of individual bargaining the employees possess in theory, but are helpless to exercise. Collective bargaining, therefore, rejects completely individual bargaining and unilateral employer action. The subject upon which the antithetical systems of collective bargaining and individual bargaining operate, i.e., the creation, interpretation and enforcement of rights and duties of employers and employees, vis-a-vis each other, are identical; it is apparent that "the two cannot exist side by side."[8]

The weakness of the employee under the system of individual bargaining tends to obscure the extent to which that system, like collective bargaining, operates as a mechanism for the

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[4] Webb, op. cit. *supra*, note 2, p. 181, McCabe, op. cit. *supra*, note 2, pp. 86-87; Daugherty, op. cit. *supra*, note 2, p. 413.

[5] Webb, op. cit. *supra*, note 2, pp. 173-179, 842; Mitchell, John, *Organized Labor* (Phila., 1903), pp. 3–4; Carver, Thomas W., *Principles of Political Economy* (Boston, 1918), p. 403; Hoxie, Robert Franklin, *Trade Unionism in the United States* (New York, 1923), pp. 255–257, 287; Watkins, Gordon S., *An Introduction to the Study of Labor Problems* (New York, 1922), pp. 332–333; Catlin, Warren B., *The Labor Problem* (New York, 1926), p. 322; Cummins, E. E., *The Labor Problem in the United States* (New York, 1932), pp. 261–262; Daugherty, Carroll R., *Labor Problems in American Industry* (New York, 1933), p. 415; Taft, Philip, *Economics and Problems of Labor* (Harrisburg, Pa., 1942), p. 703; Leiserson, William M., *Collective Bargaining and Its Effect on Production*, Annals of the American Academy of Political and Social Sciences, Vol. 91, Sept. 1920, pp. 42–43.

[6] Yoder, Dale, *Labor Economics and Labor Problems* (New York, 1933), p. 438-443; Taylor, Albion G., *Labor Problems and Labor Law* (New York, 1938), pp. 86–87; Gompers, Samuel, *Collective Bargaining* (Washington, D. C., 1920), p. 1 (Pamphlet published by the American Federation of Labor, on file in the United States Department of Labor Library); Hoxie, op. cit. *supra*, note 1, p. 294.

[7] See authorities cited notes 5 and 6, *supra*.

[8] Golden, Clinton S. and Ruttenberg, Harold J., *The Dynamics of Industrial Democracy* (New York, 1942), p. 26.

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government of industrial relations. The discrepancy in bargaining power between employer and employee leaves with the employer autocratic power not alone to create the rules which are to be binding upon the employees and upon himself, but also to change, to interpret, and to enforce those rules at will. Seldom, under individual bargaining, is the employer constrained to bind himself by contract for any definite period to assume duties or obligations to the employees. Typically, government of industrial relations consists, almost solely, of rules laid down by employers fixing the duties and obligations of employees, which, as this Court pointed out in 1898, the employees "are practically constrained to obey." *Holden* v. *Hardy*, 196 U. S. 366, 397.[9] The employer exercises the legislative power to make the rules, the judicial power to interpret them and the executive power to enforce them. The concentration of power, the lack of mutuality of obligation, and the absence of participation, all so foreign to democratic concepts, tends to induce reluctance on the part of those steeped in the democratic tradition to recognize the governmental character of the system of individual bargaining.[10]

The political analogy becomes somewhat more distinct where

[9] Bishop Francis Haas, a member of the National Labor Board established under Section 7 of the N.L.R.A., testified: "customarily, the wage relationship prior to June 16, 1933, was referred to as an individual bargain. In point of fact, among the overwhelming number of 48,000,000 workers in the United States there was no bargaining whatsoever. True, for approximately 10 percent there was union collective bargaining. . . . The great mass of workers were, at the time they were hired, simply told what they would get. Very frequently, they were not even told. After employment, when piece rates were changed, the foreman simply announced the new rates. He could announce rates as low as he chose, limited only by the shortage of workers standing ready to take jobs. Briefly the typical employer-employee relationship did not have even the appearance of trading or bargaining. The employer simply notified the worker what wages he was to get and the hours he was to work." Hearings before the Committee on Education and Labor, U. S. Senate, 73rd Cong., 2nd Sess., on S. 2926, Pt. 1, p. 116. See also Pt. 3, pp. 938–939. ". . . The expression 'individual bargaining' does not imply a bargaining process so much as it implies that the choice on the part of the worker between 'taking it or leaving it' is made individually, that is, without and concerted action with other workers in the matter." McCabe, op. cit. *supra*, note 2, p. 84.

[10] Webb, op. cit. *supra*, note 2, pp. 840-842, 217-218; Cf. American Federation of Labor Reconstruction Program, reprinted in Commons, John R., *Trade Unionism and Labor Problems* (Boston, 1921), pp. 562–563; Woll, Matthew, *Labor Industry and Government* (New York, 1935), p. 112.

individual contracts are entered into which set forth the basic law of the industry. Here too, of course, the employee is helpless to participate effectively in the formation or interpretation of the rules embodied in the contract. But mutuality of obligation is superficially present. In large industrial enterprises, where individual employment contracts are utilized, the employer undertakes to live up to the terms of the contract for its duration. The contracts are offered on a "take it or leave it" basis, however, and are accepted by the employees out of economic necessity. When some question arises which is not covered by the contract and which requires a new rule, such as, for example, whether time and a half or double time should be paid for holiday work, the employee can request double time, but the decision is made by the employer. The employer's control over the executive and judicial phases of the process are equally demonstrable. Assume that during the life of the contract the employer decides to lower the wage rate. The employee is as powerless to enforce compliance with the terms of an individual contract or to prevent the substitution of a new, and less favorable contract, as he was to reject the original contract offered by the employer. Or assume that an employer refuses to grant a promotion to which an employee believes himself entitled, on the ground that, as the employer construes the contract, the promotion is not due. If the issue is at all complicated the individual employee is wholly incapable of pressing his interpretation of the contract in the face of a contrary interpretation relied upon by the employer and his staff of experts. Assume further that an employer offers to settle an employee claim for overtime due under the contract for a fraction of the amount actually due. Again, the employee is forced by his economic weakness to accept the employer's offer, regardless of the merits of the claim.

Theoretically, of course, in each of these instances, the employee could resort to the courts for enforcement of his rights under an individual contract. As a practical matter, however, the picture of an ordinary employee in a large industrial enterprise suing his employer to recover benefits due him under his contract of employment, is unrealistic. Often the sums in issue are so small as to render the cost of litigation prohibitive.

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More important, the employee simply cannot afford to take action which would alienate the employer upon whom he is dependent for his job. Even where the employee has a contract which protects him against discharge until its expiration, the employer is still able to inform him that he will be discharged at the end of the contract term if he brings suit. In fact, many employers have a rule making the commencement of legal proceedings ground for immediate dismissal.[11] In practice then, under individual bargaining, claims by employees, whether based on a contract, or not, are settled in the same way, and on the employer's terms.

When collective bargaining supersedes individual bargaining as the system of government in industrial relations, control of the entire governmental process shifts from the employer alone to the employer and the exclusive bargaining representative of all the employees in the unit, acting jointly by agreement. Experts in labor relations uniformly assert that collective bargaining substitutes the exclusive bargaining representative for the individual in the legislative, executive, and judicial phases of industrial government, i.e., "in negotiating, interpreting and enforcing contracts and agreements."[12]

The effect of the substitution of a collective representative for individual employees in the legislative process in twofold.

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[11] For example, in *N.L.R.B.* v. *Bank of America*, 147 F. (2d) 287 (C.C.A. 9), the employer had such a rule.

[12] Watkins, Gordon S., *An Introduction to the Study of Labor Problems* (New York, 1922), pp. 332-333; see also Webb, op. cit. *supra*, note 2, pp. 179, 182-183, 194-195, 198-199, 203-204, 234-237; Hoxie, op. cit. *supra*, note 1, pp. 256, 264-267, 270-272; Lee, John, *Dictionary of Industrial Administration* (London, 1928), p. 88; Twentieth Century Fund, *Labor and Government* (New York, 1935), pp. 46-47; Taylor, op. cit. *supra*, note 6, p. 87; Daugherty, op. cit., *supra*, note 5 (1938, ed.), pp. 450, 452-453, Brooks, Robert R. R., *As Steel Goes* (New Haven, 1940), pp. 204, 211; Cooke, Morris L. and Murray, Philip, *Organized Labor and Production* (New York, 1940), pp. 192-193; Lester, Richard A., *Economics of Labor* (New York, 1941), pp. 626-627; Taylor, George W., The Function of Collective Bargaining, in American Management Association, Personnel Series No. 81, Management's Stake in Collective Bargaining (1944), pp. 11-13; Dash, Allen G., *Bargaining Through the Grievance Procedure*, in American Management Association, Personnel Series No. 82, The Collective Bargaining Agreement in Action (1944), pp. 3-5; Shulman, Harry, The Role of the Impartial Umpire, ibid., pp. 7-8; Peterson, Florence, *American Labor Unions* (New York, 1945), pp. 231-237; Weyand, Ruth, *Majority Rule in Collective Bargaining* (July 1945), 45 Col. L. Rev. 556, 588-589.

First, the bargaining power of the group is utilized to secure rules more favorable to the employees as a whole than they could secure through individual bargaining; second, the bargaining power of the group is utilized to obtain from the employer binding commitments, thereby introducing mutuality of rights and mutuality of obligations into the employment relations. The collective agreement arrived at through negotiation between the employer and the exclusive representative becomes the basic law of the industry.[13] In it are included the rules agreed upon by the parties respecting such problems as they can foresee and deem of sufficient importance to handle in this fashion. In many instances the exclusive representative will seek to include in the contract provisions settling all "grievances" [14] which exist at the time the exclusive representative is recognized. These may include, for example, demands for higher wage rates, shorter hours, paid vacations, seniority systems and, perhaps, a bonus based on work previously performed. Such demands raise issues of policy as to

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[13] *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. (2d) 632, 638 (C.C.A. 4); Twentieth Century Fund, *Labor and the Government* (New York, 1935), p. 47; Hoxie, op. cit. *supra*, note 1, pp. 264-265; Perlman, Selig, and Taft, Philip, *History of Labor in the United States*, 1896-1932 (New York, 1935), p. 10; Brooks, Robert R. R., *As Steel Goes* (New Haven, 1940), p. 204; Golden and Ruttenberg, op. cit., *supra*, note 8, p. 43.

[14] The term "grievances" is often used to signify all matters arising out of employment relations which may be disposed of by agreement between employees and employers, the definition originally given the term in collective bargaining parlance. Subsequently the term has been accorded a variety of meanings. It is sometimes utilized to refer to matters handled pursuant to grievance procedure; in such instances a distinction is usually drawn between grievances and issues which require new agreement between the parties. We believe that the term is so used in the Railway Labor Act. See *infra*, p. 35. The term, however, has occasionally been used also to refer to matters of primary interest to individual employees which involve some personal complaint not related to wages, hours, or other basic conditions of employment and not covered in the collective bargaining agreement. Conceivably, the term "grievances" as used in the Railway Labor Act could have the latter meaning, as being a kind of dispute distinguished from disputes arising out of "interpretation of application of agreements" on the one hand, and disputes concerning "rates of pay, rules, or working conditions" on the other. If this be its definition, however, since the matter here in issue is wages and hours fixed in a collective agreement, it would not be a grievance within the meaning of the Act. In the National Labor Relations Act, the term "grievances" appears in contexts which indicate that Congress there utilized the term in its broadest meaning *(infra*, pp. 37-38).

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which, in the absence of a collective agreement, there is usually no standard by which the correctness of any particular solution can be judged.[15] The process of arriving at agreement is necessarily, therefore, one of trading or compromise.

Wide variety exists in practice, with respect to the number and type of matters dealt with in collective agreements. In some industries the parties seek to incorporate in the collective agreement detailed formulae for resolving forseeable future questions as well as detailed solutions of all questions which antedate the agreement, thus narrowing the range of legislative problems to be faced in the future.[16] In other industries the collective agreement is merely a skeleton, containing broad principles, which are to be implemented by a process of day to day negotiations, as specific issues arise.[17] It is universally

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[15] Webb, op. cit. *supra*, note 2, pp. 184, 225-233; Twentieth Century Fund, *Labor and the Government* (New York, 1935), pp. 48-49.

[16] Pierson, Frank C., *Collective Bargaining Systems* (Washington 1942), pp. 26-30. Although agreements in bituminous coal fall in this category their grievance machinery has been said to establish "an orderly process by which the rights of both parties could be protected, disputed terms could be interpreted with a minimum of friction and 'continuous bargaining' could 'take place on subjects not specifically covered by the agreement' ". Twentieth Century Fund, *How Collective Bargaining Works* (New York, 1942), p. 244. Cf. Report of the United States Coal Commission, Sen. Dec. 195, 68th Cong., 2nd Sess. (1925), Pt. III, p. 1345. The agreements entered into by the International Ladies' Garment Workers, have been described as "far more detailed and comprehensive than those of other unions," Christenson, C. Lawrence, *Collective Bargaining in Chicago*, 1929-1930, Univ. of Chi. Press (1933), p. 326. Yet in a description of the functions of this union, another author states: "In addition to price settlements the union is called upon by its members to adjust various other complaints and grievances in the shops. A great number of such disputes—concerning unequal distribution of work, discharges, back pay, or wage rates below the minimum scale—are inevitable under the best phrased contracts and the most cooperative employers. Their settlement constitutes in bulk and in importance the characteristic activity of the union as a business organization." Carsel, Wilfred, *A History of the Chicago Ladies' Garment Workers Union*, Normandie House (1940), pp. 247-248.

[17] In such industries, the agreements "set forth the general framework" of the relationship between the employer and the union and "leave the details to be filled in by daily negotiations." Twentieth Century Fund, *How Collective Bargaining Works* (New York, 1942), p. 644. At p. 566, the authors state: "To the large steel companies . . . collective bargaining revolves mainly about the settlement of grievances." See also Taylor, George W., op. cit. *supra*, note 12, pp. 11-13; Dash, op. cit. *supra*, note 12, pp. 3-5.

recognized, however, that it is impossible to foresee in advance all questions which may arise in the course of industrial development with respect to which the parties must eventually come to agreement. Changes in market conditions, new inventions, cost of living changes, all indicate the necessity of providing for additions to and changes in the basic contract. The process of legislating in the field of collective bargaining is, and must be, a continuous one.

The judicial phase of industrial government likewise differs markedly under collective bargaining from the situation under individual bargaining. Application of the terms of an agreement, no matter how detailed, is bound, of course, to give rise to questions of interpretation. And, just as the employees participate through their representative in the formulation of the contract so do they participate through their representative in the interpretation and enforcement of the contract.[18]

The Brief of the United States as Amicus Curiae, pp. 4, 10, 20-21, 32, 33, recognizes that the disparity of bargaining power between employers and individual employees is equally present and equally significant in negotiations for adjustment of executive and judicial as well as legislative matters. Participation of the exclusive representative in the judicial phase of collective bargaining is essential not only to protect the interests of the individual employee who may present a claim, but also, to safeguard the interest of the group as a whole. It is a fundamental principle of trade unionism that "the only way to prevent [progressive deterioration of wages and other working conditions] is to rule out all competition between the individual workers of the group, both in the making of the bargain with the employer, and in the subsequent interpretation of it and work under it" [19] Were employees permitted to bargain with the employer concerning the settlement of alleged violations of the contract, each victim of such a violation would be likely to receive far less than that to which he was entitled. Indeed, the employer might find the cost of settlement with individuals so small as to warrant his wholesale

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[18] See authorities cited in note 12, *supra*.

[19] Hoxie, Robert Franklin, *Trade Unionism in the United States* (New York, 1923), p. 255. See also, Watkins, op. cit. *supra*, note 12, pp. 332-333; Taylor, op. cit. *supra*, note 6, pp. 86-87.

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departure from the standards laid down in the contract. In this manner "what was made collectively could be promptly unmade individually." *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 343, 346. Where interpretation of a term of the agreement is involved the employer may find individual employees willing to accept, or unable to resist, interpretations which detract from the full force of the obligation imposed upon the employer in the collective agreement. Because of the precedent creating nature of such interpretations,[20] it is apparent that the interpretation acceptable to the most necessitous among the employees would soon become the interpretation binding upon all. For these reasons collective bargaining rejects these manifestations of individual bargaining as it does all others. The Brief of the United States, p. 4, admits that when a collective bargaining representative and an employer settle between them a matter of interpretation or enforcement of a collective agreement "they are bargaining collectively in a true sense." Of course, if the disposition of such matters by agreement between a representative of the entire employee group and an employer is collective bargaining then disposition by agreement between individual employees and their employer is individual bargaining. Under collective bargaining, the collective power of the exclusive representative is utilized to safeguard the gains already won, to protect against diminution of the employer's obligations through the disintegrating process of one-sided interpretation, to compel adherence to the terms of the agreement, and to secure adequate redress for violations.[21]

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[20] "Many of the cases handled through grievance procedure may involve similar questions. Such similar cases may frequently be settled more speedily by references to previous decisions. Often the steward will be able to agree on settlements in line with precedents already established. These precedents . . . may develop over a period of years into a body of industrial common law supplementing the basic contract." U. S. Dept. of Labor, Division of Labor Standards, Bull. No. 60, Settling Plant Grievances, Gov't Print. Off. (1943), pp. 37-38. "The rules and regulations first set forth in the contract are elaborated and changed" in the day to day application of the agreement, thus evolving "into a body of industrial common law . . ." Golden, Clinton S. and Ruttenberg, Harold J., op. cit. *supra*, note 8, p. 43; Block, Louis, *Labor Agreements in Coal Mines* (New York, 1931), p. 31; Daugherty, op. cit. *supra*, note 2 (1938 ed.), pp. 452-453; Dash, op. cit. *supra*, note 12, pp. 3-5.

[21] Mitchell, op. cit. *supra*, note 5, p. 5; Hoxie, op. cit. *supra*, note 1, pp. 291-292; Lester, op. cit. *supra*, note 12, pp. 626-627; Webb. op. cit.

To handle questions involving interpretation and enforcement of the collective agreement, exclusive representatives and employers universally include in collective agreements a grievance procedure.[23] Establishment of such a procedure may, and in fact does, precede adoption of other standards dealing, for example, with wages and hours.[24] Once an exclusive representative has been selected by the employees and recognized by the employer, until a formal contract is executed, all day to day issues which arise are handled by the parties as "grievances." [25]

To facilitate their disposition the parties agree on a system, usually involving several stages, through which complaints may pass. Thus, for example, it may be provided that a grievance shall be first discussed between the union shop steward representing the employee, and the foreman, representing the employer. If the matter is not settled at this stage, the next step may be consultation between the union grievance committee and the general superintendent. If the parties are unable to agree at this stage it may be provided that the issue shall be taken up by the chairman of the grievance committee or the union president, and the employer's chief personnel officer.[26]

Following execution of a collective agreement the grievance machinery normally continues to function as the procedure through which all questions which arise during the duration of the agreement are presented and settled. Experts in trade union practice and procedure recognize, however, that a distinction should be drawn, for the purpose of guiding the atti-

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supra, note 2, pp. 203-204; Pierson, op cit. *supra*, note 16, pp. 13, 31, see also note 12, *supra*.

[23] Hoxie, op. cit. *supra*, note 1, pp. 264-265; Leiserson, op. cit. *supra*, note 5, pp. 48-49; Twentieth Century Fund, *Labor and Government* (New York, 1935), pp. 44-49; Dickinson, Z. Clark, *Collective Wage Determination* (New York, 1941), pp. 18-19; Pierson, op. cit. *supra*, note 16, p. 12; Peterson, op. cit. *supra*, note 12, pp. 231-232; U. S. Dept. of Labor, Bureau of Labor Statistics, Bull. No. 686, *Union Agreement Provisions* (Wash. 1942), p. 145.

[24] Twentieth Century Fund, *Labor and Government* (New York, 1935), pp. 46-47.

[25] See, e.g., *Matter of Ross Gear & Tool Co.*, 63 N.L.R.B., No. 158; *Matter of Hughes Tool Co.*, 56 N.L.R.B. 981, 982, 984; *Matter of Wilson & Co.*, 19 N.L.R.B. 990, 994-1001.

[26] See pp. 61-62, *infra*, and note 104, *infra*.

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tude of the parties, as well as for the purpose of indicating the appropriate forum for final disposition if the parties themselves cannot reach an agreement, between grievances which involve only the interpretation or enforcement of the contract, and those which require new agreement. Questions of the former type, judicial in nature, should be resolved, it is believed, not through a process of trading or compromise, or by resort to an estimate of the economic strength of the parties but by application of the principles already agreed to between them.[26] Collective agreements widely recognize this distinction by providing that where the union and the employer cannot agree as to the proper interpretation or manner of enforcement of the agreement, the issue is to be submitted to arbitration as the final step in the grievance procedure, and that when the parties cannot come to agreement with respect to a question not covered by the contract or involving a formal change in the terms of the contract, the issue is to be resolved in the same fashion as the making of a new contract.[27] Often contracts further provide that there shall be no resort to economic conflict during the life of the agreement, and these usually make the decision of arbitration binding on the parties. If bargaining fails to bring the parties to a meeting of the minds on a "new" question, it remains unsolved until the agreement expires and the parties become free to resort to their economic strength to resolve it.[28]

To the arbitrator under such agreements is delegated the judicial power of the employer and the exclusive representative to the extent they cannot by mutual agreement resolve all judicial questions.[29] The role of the exclusive representative

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[26] Webb op. cit. *supra*, note 2, pp. 182-184; Golden and Ruttenberg, op. cit. *supra*, note 8, pp. 95-99; Pierson, op. cit. *supra*, note 16, pp. 20-21; Hoxie, op. cit. *supra*, note 1, pp. 266-267.

[27] Webb, op. cit. *supra*, note 2, pp. 192-194, 226-230; Twentieth Century Fund, *Labor and the Government* (New York, 1935), pp. 48-49; Pierson, op. cit. *supra*, note 16, p. 13; Mitchell, op. cit. *supra*, note 5, pp. 12-18, 20-21, 28-30, 33; U. S. Dept. of Labor, Bull. No. 60, op. cit. *supra*, note 20, pp. 5-6, 24-25.

[28] Webb, op. cit. *supra*, note 2, pp. 184-185, Pierson, op. cit. *supra*, note 16, p. 29.

[29] Contemporary writers all emphasize the point that the arbitrator is not a substitute for day-to-day collective bargaining under the grievance machinery but is merely to "resolve those disputes under a contract" which the union and the employer, "after exhaustive effort, cannot them-

in arbitration proceedings under a collective agreement is that of a party to a law suit. The arbitrator is only called upon to resolve disputes between the union and the employer as to the interpretation and application of the contract. The representative is in a position to explain to the arbitrator, from the viewpoint of the employees as a whole, the considerations which led to adoption of the provision in question and to explore the effects of adoption of various possible interpretations. Moreover, participation of the exclusive representative is essential to secure for the employees the advantages of expert advocacy available to the employer.

Trade union practice sometimes mirrors the distinction in methods of final resolution of legislative and judicial issues at earlier levels of negotiation and adjustment. Thus, legislative questions may be handled by negotiation between management and a "bargaining committee" of the union, and judicial questions between management and a "grievance committee." [30] On the management side, different officers may be designated to act in each type of matter. This practice readily explains the development of a connotation for the term "grievances," far more narrow than its original usage in collective bargaining as synonymous with complaints.

While the distinction between legislative and justiciable questions in collective bargaining is important for the purpose of guiding the approach of the parties and the ultimate mode of disposition of questions, it must be borne in mind that the distinction is not capable of mechanical application. Often disputes arise concerning whether a particular question should be treated as legislative or judicial, and the arbitrator may be called upon to make a preliminary determination on this point.[31]

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selves resolve." Shulman, op. cit. *supra*, note 12, pp. 7-8. See also Dash, op. cit. *supra*, note 12, pp. 3-5; Taylor, George W., op. cit. *supra*, note 12, pp. 11-13.

[30] Webb, op. cit. *supra*, note 2, pp. 194-206; Pierson, op. cit. *supra*, note 16; pp. 29-30; U. S. Dept. of Labor, Bull. No. 60, op. cit. *supra*, note 20, pp. 35-37; Twentieth Century Fund, *How Collective Bargaining Works* (New York, 1935), p. 459.

[31] Cf. Rules and Plan of Procedure Adopted by the Board of Grievances, Article 21, as printed in Winslow, Charles, Industrial Court of the Cloak, Suit and Skirt Industry of New York City (U. S. Dept. of Labor, Bureau of Labor Statistics, Bull. No. 144, 1914), p. 14: "Whenever, in the opinion of the board of grievances, a general situation arises requiring adjustment by both organizations, or revision or amendment of the protocol,

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If he is of the opinion that the question cannot be resolved by reference to agreements already made he may refer the question back to the parties for negotiation.[22] Even where the distinction is applied with such strictness, and frequently it is not, there may be a limited amount of legislation in the judicial process. It may be used to supply details omitted from the contract where, to use the language of this Court, "no effort is made to bring about a formal change in terms or to create a new one" (slipsheet, p. 10). The distinction is much the same as that made in the common law system in which a reserve of legislative powers remains in the courts.

Apart from the somewhat nebulous distinction between legislative and judicial questions, collective bargaining neither in theory nor in practice, has drawn any line between grievances on the basis of their prospective or retrospective character. On the contrary, it is recognized that the settlement of a grievance involving interpretation or enforcement of a contract may have effects far more important for the future than for the immediate situation which gave rise to the question. Thus, while the occasion for consideration of a problem of interpretation or enforcement is normally a claim that the employer has either done or failed to do something required by the contract, for example, that the employer by promoting one employee rather than another has failed to follow the seniority system set forth in the contract, the terms of settlement will affect all of the employees in the unit, whenever, during the remainder of the contract promotions are to be made. Similarly, when a grievance arises concerning a matter not covered in the contract, and the parties are called upon to establish a new rule

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it shall call a conference of both organizations by duly authorized representatives to consider and discuss such matters."

[22] The Agreement between General Motors Corp. and UAW-CIO, June 3, 1941, Article 46, provided: "The Umpire shall have no power to add to or subtract from or modify any of the terms of this Agreement or any agreements made supplementary hereto;" etc. In Umpire Decision No. A-97, "Hiring Rate for New Employees" (June 13, 1941), under this agreement, the umpire refused to pass upon a new scale of hiring rates, referring the issue back to the parties without decision, and adding: "The Umpire strongly recommends, however, that the problem discussed herewith be carefully considered by the parties by collective bargaining procedure." Cf. Spencer, William H., The National Railroad Adjustment Board, 11 Uni. of Chi. Journal of Business, No. 2, Pt. 2 (May 1938), pp. 30-31.

to cover the situation, the rule will normally be applied not only to settle grievances of a similar character which might arise in the future but also to dispose of the then pending case or cases which were the occasion for adoption of the rule."

Both prospective and retrospective aspects of grievance settlements invariably affect the collective interest of the entire group of employees, no matter how narrow the matter involved may appear at first glance. Seldom, indeed, does a grievance arise which is based upon some factor of personality or circumstance peculiar to a single employee. Even if there could be assurance that no other employees would in the future seek adjustment on the same ground, the settlement would be of interest to the group, for it would indicate the extent to which the employer is willing to take cognizance of, and make allowance for, difficulties arising out of deviations from the norm. From still another point of view the settlement of every grievance affects the employees as a group. The sum available for allocation by any business enterprise to the cost of labor is not unlimited. To the extent, therefore, that the settlement of any grievance involves an increase in labor cost, it decreases, *pro tanto*, the employers' ability to settle other grievances on favorable terms. The exclusive representative is, and must be, therefore, as vitally concerned in the retrospective as in the prospective phases of grievance adjustment.

The foregoing illustrations suggest one of the major problems inherent in the substitution of bargaining through a collective representative for bargaining by individuals, to wit, who shall represent the group, and, if the interests of all employees do not coincide, what position shall the representative take. When faced with the problem of adopting a blanket rule for resolving these questions, the trade union movement, again following the political analogy, urged utilization of the principle of majority rule. The role ascribed to the individual employee in the industrial democracy created by collective bargaining is held to be the same as the role of the citizen in political life. In that role, a majority of the employees determine both the identity of the representative and its policies. The choice of the majority is binding upon all, for the represent-

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" See authorities cited note 20, *supra*.

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ative selected is the representative of all, not merely of the majority. Were minorities free to repudiate decisions of the majority representative government could not survive either in the industrial or in the political world.

Political analogy, by the same token, supplies the key to the rights of minorities and individuals. Familiar democratic concepts mark the outposts of legitimate exercise of governmental power in the industrial, no less than in the political world. The representative is bound to refrain from discrimination against them, and to permit the minority full opportunity, through discussion and solicitation, to become the majority. In addition, individuals, as well as minorities, are accorded the inherent right, in the words of the federal Constitution "to petition the Government for redress of grievances." Since under the system of collective bargaining, governmental power in industry is vested not in the employees' representative alone, but is divided between the employer and the representative, this right permits both individuals and minorities to present their claims to the employer as well as to the employee representative. Just as the citizen may petition the legislature, the executive, and the judiciary for correction of some claimed injustice or inequity, so may the employee present his grievance to any of the repositories of governmental power created by the employer and the exclusive representative, regardless of the nature of the grievance, and without regard to whether the exercise of legislative, executive, or judicial power is necessary to satisfy his claim.

The division of governmental power between employer and employee representatives tends to cast the executive and judicial agencies of industrial government, as well as the legislative agency, into bipartisan molds. Normally, the individual or group which wishes to press a grievance will bring the matter to the attention of either the officers of the exclusive representative charged with handling such matters, or to the attention of the constituency as a whole. If successful in obtaining majority support for the claim at this stage, the individual's claim becomes the claim of the group and is disposed of by the appropriate officials of the representative acting in conjunction with the designated officials of the employer. If the

claimant is unsuccessful, the exercise of the right of petition permits him to present his case to the agency of industrial government composed of the representative and the appropriate officers of the employer. If upon such presentation the employer sees no merit in his claims, there is, of course, no further remedy, except to return to the employees and attempt to induce a majority to change their position. If, however, the employer representatives find merit in the claim, they will then urge their views on the matter to the officials of the employees' representatives who sit with them as part of the appropriate agency and dispose of the matter by joint action with them. Since all parts of the industrial government are bipartisan, all of its acts, including both legislative and judicial, take the form of agreements between the employer and the employee representative. However, although the bipartisan decisions disposing of grievances are often reduced to writing, the term, "collective bargaining agreement," is usually restricted to the formal legislative contract.

In sum the theory and practice of collective bargaining require the view that the representative chosen by the employees *is* the employees in all aspects of the process in which working conditions are established and enforced. Individual employees may be heard jointly by the representatives and the employer, but establishment and enforcement of the terms of employment, generally and specifically, is the function of the employer and the employee representative alone.

II. CREATION OF A LEGAL SYSTEM COMPATIBLE WITH THE PRINCIPLES OF COLLECTIVE BARGAINING REQUIRED REJECTION OF THE COMMON LAW CONCEPTS WHICH THE COURTS HAD APPLIED TO INDUSTRIAL RELATIONS.

The courts operating under common law principles in considering collective bargaining ignored the basic economic and political premises upon which the system is predicated. Prior to the enactment of legislation, the courts, of course, never forced employers to bargain with unions. The courts' contact with the collective bargaining process in the main stemmed from controversies involving the enforceability of collective agreements voluntarily entered into between an employer and

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a union, and the relation of such agreements to contracts between the employer and individual employees.

To the resolution of these problems the courts brought only [illegible] ficiary,[35] and freedom of contract.[36]

Application of these concepts led to uniform preservation to individual employees of the right to contract with their employer. When the union entered into a bargaining contract with the employer, the employee only became entitled to its benefits if he could establish that he and the employer had adopted the terms of the collective agreement as the terms of the relationship between them.[37] Finally, contracts executed between such a representative and the employer, even though purporting to cover all of the employees, were considered binding only upon those who had authorized the representative to act for them or who had ratified its acts.[38]

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[34] *Shelley* v. *Portland Tug & Barge Co.*, 158 Ore. 377, 76 P. 2d 477; *Ahlquist* v. *Alaska-Portland Packers' Assn.*, 39 P. 2d 348 (C.C.A. 9); *Clark* v. *Claremont Apt. Hotel Co.*, 19 Wash. 2d 115, 141 P. 2d 403; *Gulla* v. *Barton*, 164 App. Div. 293, 149 N. Y. Supp. 952.

[35] *Huston* v. *Washington Wood & Coal Co.*, 4 Wash. 2d 449, 452-453, 103 P. 2d 1095, 1097; *Individual Damp Wash Laundry Co.* v. *Meyers*, 10 Ohio Op. 517; *Sublett* v. *Henry's Turk and Taylor Lunch*, 123 P. 2d 844, aff'd 21 Cal. 2d 273, 131 P. 2d 369, 56 Harv. L. Rev. 294; *Yazoo & M. V. R. Co.* v. *Sideboard*, 161 Miss. 4, 133 So. 669; *Helt* v. *Britten-Fenton Co.*, 180 Misc., 1077, 44 N. Y. S. 2d 58.

[36] See Witmer, T. Richard, *Collective Labor Agreements in the Courts* (December, 1938), 48 Yale L. J. 195, 227-239; Lenhoff, Arthur, *The Present Status of Collective Contracts in the American Legal System* (May, 1941), 39 Mich. L. Rev. 1109, 1143-1150; Braun, Kurt, *The Dual Nature of Collective Agreements* (October 1943), J. Pol. Econ. 451, 454-457.

[37] In *Langmade* v. *Olean Brewing Co.*, 137 App. Div. 355, 121 N. Y. Supp. 388, the plaintiff, a union member, had been told he could quit if he was not satisfied at receiving less than the union's agreement provided. In denying him recovery the court stated at 357, 121 N. Y. Supp. at 390: "It is probably true that the contract entered into by the defendant with the union can be read into the agreement with the plaintiff *(Keysaw* v. *Dotterweich Brewing Co.*, 121 App. Div. 58). The existence of that agreement, however, did not prevent the parties to this action from regulating the compensation to be paid to the plaintiff. They could make an independent agreement disregarding the one with the union, and they did that." Cf. *Yazoo & M. V. R. Co.* v. *Webb*, 64 F. 2d 902 (C.C.A. 5); *Dierschow* v. *West Suburban Dairies*, 276 Ill. App. 355; *Ryan* v. *Ryan*, 156 Kan. 348, 133 P. 2d 119; *Mastell* v. *Salo*, 140 Ark. 408, 215 S. W. 583.

[38] *McGregor* v. *Louisville & N. Ry.*, 244 Ky. 696, 51 S. W. 2d 953; *Piercy* v. *Louisville & N. Ry.*, 198 Ky. 477, 248 S. W. 1042; *McCoy* v.

Collective bargaining, patently, could not flourish in so hostile a legal climate. The premise that inequality of bargaining power between individual workers and employers made freedom of contract a myth, demanded as a corollary, withdrawal of legal sanction from the individual contract.[39] The premise that equality of bargaining power could be restored only if the workers acted as one man, required rejection of the concept of the representative as an agent of individual employees and substitution of a concept in which the representative was accorded a status similar to the status of a political representative. This meant that the representative could exercise the power of all the employees involved on behalf of all, whether or not each individual had under agency principles given the representative an authorization to represent him. It required adoption of a test for determining when collective bargaining should replace individual bargaining. Acceptance of the governmental analogy in turn pointed to majority rule as that test. Statutory adoption of majority rule required further the establishment of a method for determining whether a majority of a group of employees had decided to make the change to collective bargaining and of ascertaining the representative chosen. It required recognition that once such substitution was made, the power to contract and bind the group and each individual in it vested exclusively in the representative chosen by the group and that individuals could not either themselves or through another agent contract with the employer on any subject involving the employment relation. Finally, it required recognition of the collective agreement as a bi-party contract between the employer and the exclusive representative.

St. Joseph Belt Ry., 229 Mo. App. 506, 77 S. W. 2d 175; *Earle* v. *Illinois Central R. R.*, 25 Tenn. App. 660, 167 S. W. 2d 15; *Panhandle & S. F. Ry.* v. *Wilson*, 55 S. W. 2d 216 (Tex. Cir. App.).

[39] The cases bear out the economists conclusions that the employee is regularly exploited under individual bargaining. Thus, in the *Huston* case, *supra*, note 35, it was held that a collective agreement for a higher rate of pay did not supersede a prior individual contract for a lower rate, whereas in the *Langmade, Shelley, and Sublett* cases, *supra*, notes 34, 35, and 37, it was held that individual contracts for a lower rate of pay superseded prior collective agreements for a higher rate.

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III. IN THE RAILWAY LABOR ACT CONGRESS ADOPTED THE CONCEPTS OF COLLECTIVE BARGAINING WHICH EXCLUDE INDIVIDUAL BARGAINING RESPECTING GRIEVANCES.

National labor policy during the past 25 years reflects Congressional recognition of the validity of the premises upon which the system of collective bargaining rests. The history of that policy is one of progressive encouragement of the growth of collective bargaining and its practices and procedures, by establishment of the legal climate and administrative machinery necessary to the successful operation of the system.

One facet of that policy, embodied in the Railway Labor Acts of 1926 and 1934, the Norris-LaGuardia Act of 1932, and the National Labor Relations Act of 1935, has been the protection, against interference by employers and by the courts, of the right of employees to organize for the purposes of collective bargaining. Another facet, immediately pertinent in the instant case, has been the imposition upon employers of an affirmative duty to bargain collectively, i.e., to recognize the transference of power to contract from individual employees to the representative of all. Finally, as the method for determining when that duty arises, i.e., when collective bargaining shall replace individual bargaining as the system of government in particular enterprises, Congress adopted the principle of majority rule and created administrative agencies charged with the duty of its application. These aspects of federal policy, incorporated in the Railway Labor Act of 1934, as well as in the National Labor Relations Act, as this Court has pointed out, "absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 346; cf. *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 523-526.

A. The Terms of the Railway Labor Act Respecting the Powers of the Statutory Representative

While the objective of federal policy, establishment of the practice of collective bargaining, is the same in the railroad

field as in industry generally, Congress necessarily adopted different techniques for defining the obligations of the parties to the collective bargaining relationship in the Railway Labor Act and in the National Labor Relations Act. Since it found it desirable to establish an administrative agency to interpret and enforce the latter, it was not necessary for it to spell out in that statute the full content of the collective bargaining obligation; it was enough merely to require employers to "bargain collectively" (Section 8 (5)). No such administrative agency was created to interpret and enforce the Railway Labor Act; hence, Congress provided a detailed description of the duties of the parties. In addition, concern over the serious consequences of strikes in the railroad industry led Congress to supplement the bargaining procedures voluntarily established by the parties with agencies designed to serve as terminal steps in the collective bargaining process, thereby eliminating, so far as possible, the danger of a failure of the parties to reach a peaceful accord. Recognizing that the labor movement distinguishes for purposes of approach and ultimate modes of disposition between grievances involving legislative questions and those involving judicial or administrative questions, Congress provided separate agencies for the purpose of handling the two types of disputes at the final stage. Thus, the Railway Labor Act confers jurisdiction over all "disputes concerning rates of pay, rules or working conditions not adjusted by the parties in conference," upon the Railway Mediation Board (Section 5 First (a)), and confers jurisdiction over all disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions" as to which no adjustment has been reached by the parties upon the National Railroad Adjustment Board (Section 3 First (i)).

That the distinction so common in the labor world between disputes requiring new agreement between employers and unions, and disputes requiring only interpretation or application of agreements was adopted by Congress solely for the purpose of defining the respective jurisdictions of these agencies and was not intended to limit the scope of collective bargaining or to detract from the duty of employers to recognize in the

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employee representatives exclusive power to conclude agreements on all matters in dispute is obvious from the terms of the legislation. Like the National Labor Relations Act, the Railway Labor Act vests in a majority of the employees involved the power to determine who shall be the representative of all and compels employers to recognize and bargain with the representatives thus selected. Section 9 (a) of the National Labor Relations Act declares that the representatives so selected "shall be the exclusive representative of all employees . . . *for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment*" (Italics added). Section 2, Paragraphs Fourth and Ninth of the Railway Labor Act, which contain the corresponding provision for majority rule provide—

> Fourth: Employees shall have the right to organize and *bargain collectively* through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class *for the purposes of this Act*. . . .
>
> Ninth: . . . Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class *for the purposes of this Act*. . . . (Italics added).

While the first sentence of Paragraph Fourth, with its specific reference to the right to "bargain collectively," would in itself indicate that representatives selected by the majority under that Act, as under the National Labor Relations Act, automatically preempt all power to negotiate and contract with employers on all matters affecting wages, hours, and working conditions, the reference in both passages to "the purposes of this Act," which are set forth in Section 2, leaves no room for doubt on this score. For Section 2, headed "General Purposes" declares that the Act is designed, *inter alia*, "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions," and "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." Since the settlement of both types of disputes are

thus included in the purposes of the legislation, it is perfectly clear that the representative of the craft or class chosen "for the purposes of this Act" has, under Paragraphs Fourth and Ninth, equally plenary authority over both subjects, and that the carrier's duty to treat with the exclusive representative extends, as well, to both.

This interpretation is further supported by Paragraphs Second and Sixth of Section 2 of the Railway Labor Act. Paragraph Second provides that "*all* disputes . . . shall be considered and *if possible decided* . . . in conference between representatives designated and authorized" by the parties interested in the dispute. There is no differentiation between disputes involving legislative questions and those involving the interpretation or application of agreements in the requirement that there be conferences between authorized representatives, and that such representatives shall if possible decide the questions. Paragraph Sixth implements the requirements imposed upon carriers and exclusive representatives in Paragraph Second with respect to the procedure for handling disputes which the statute classifies as arising "out of grievances or out of the interpretation or application of agreements." It provides that in case of such disputes "it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees . . . to specify a time and place at which such conference shall be held. . . ." The structure of the legislation thus demonstrates adoption by Congress of the principle that disputes of all types between carriers and employees, those involving "disputes arising out of the interpretation or application of agreements," as well as those involving the making or amendment of agreements concerning wages, hours, and working conditions, shall be the subject of collective bargaining between the carrier and the exclusive representative of the employees involved.

We submit that in view of the provisions described above, no difference in the power of the statutory representative with respect to the two types of dispute should be made on the basis of implication. Certainly if Congress had intended that the representative have two different kinds of power, it would have said so in no uncertain terms. The Court, in its opinion

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in the instant case, has recognized that the power of the representative with respect to legislative matters is "exclusive" but has held that the Act does not expressly state whether the representative enjoys similar exclusive powers regarding judicial and executive matters (slipsheet, p. 14). We believe that the statutory grant of power is just as express in the one case as in the other and that the very provisions which grant the admittedly exclusive legislative power apply equally to judicial and executive matters. In *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, which the Court cited as authority for its statement of the exclusive legislative power of the representative (slipsheet, p. 14), the provisions of the Act relied on were Section 2 Third, Fourth and Ninth (300 U. S., at p. 548). These sections make no distinction between the two types of dispute and apply equally to both. They cannot be given different meanings dependent on the type of dispute involved.

B. The Legislative History

1. The failure of Congress to limit the power of the statutory representative under the Railway Labor Act to settle grievances.

The legislative history of the Railway Labor Act, moreover, indicates that Congress rejected suggestions which would have limited the power of the exclusive representative to legislative matters and would have reserved to individual bargaining those matters involving the exercise of judicial and administrative powers which the statute defines as grievances (see note 14, *supra*). A suggestion was advanced in the course of hearings on the bill by Federal Coordinator of Transportation Eastman and Mr. George M. Harrison representing the Railway Labor Executives Association, that the selection of exclusive representatives by a majority of any craft or class should be only "for the purposes of making and revising agreements concerning rates of pay, rules, and working conditions" and that employees should be free to engage in individual bargaining, i.e., to represent themselves, or to select any agent they pleased to represent them, in negotiating with employers on issues involving interpretation or application of agreements. (Hearings before the House Committee on Interstate and Foreign Com-

merce, on H. R. 7650, 73rd Cong., 2d Sess., pp. 44, 83, 85, 89). This suggestion, avowedly advanced in the interest of safeguarding the rights of individuals and minorities against adverse action by the exclusive representative, was never adopted. We submit that its rejection is attributable to realization by Congress and perhaps by the sponsors themselves who never put this suggestion in the form of an amendment, that such a restriction upon the function of the exclusive representative would be wholly incompatible with the principles and practice of collective bargaining; that it would completely fail of its purpose of protecting individuals and minorities against unfavorable action by the exclusive representative since it afforded no safeguard against such action when taken in connection with the formation and revision of agreements; that it would, by freeing the employer of the obligation to bargain with exclusive representatives as to "grievances," recreate, as to those matters, the very inequality of bargaining power which it was the object of the legislation to destroy; and that protection of the rights of individuals and minorities, was to be achieved, if at all, within the framework of the majority rule principle and the political analogy upon which its adoption was based (*infra*, pp. 45-58). Not one word in the statute can be construed as supporting a construction which would restrict the scope of collective bargaining or the authority of the exclusive representative to contract with the employer.

2. The Failure of Congress to Limit the Power of the Statutory Representative under the National Labor Relations Act to Settle Grievances.

a. The Terms of the National Labor Relations Act.

The foregoing interpretation of the failure of Congress to embody in the Railway Labor Act amendments restrictive of the authority of exclusive representatives to bind individuals and minorities with respect to all matters affecting terms and conditions of employment, is fortified by the corresponding provisions of the National Labor Relations Act and their legislative history. In that Act Congress did not distinguish at all between the legislative, executive, and judicial phases of collective bargaining and the reason for its failure to do so is

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clear; there was no attempt to create tribunals supplementary to the grievance machinery which the parties would establish in the normal course of collective bargaining, in which connection alone, such a distinction would be meaningful.

Section 8 (5) of the National Labor Relations Act compels the employer "to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a)." Section 9 (a) as noted above (p. 33), adopts the principle of majority rule and makes it clear that the representative selected is to have plenary authority to bargain and contract about all "rates of pay, wages, hours of employment, or other conditions of employment." But Section 9 (a) goes further, and in conjunction with its adoption of the majority rule principle, spells out one of the limitations upon the power of the majority, inherent in the principle as it has developed in the political world, i.e., the right of individuals and minorities to petition the Government for redress of grievances. Thus, the proviso to that Section declares "that any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

At the outset it should be noted that the Act itself bears internal evidence that Congress considered grievances to be synonymous with the subject matter of collective bargaining (see note 14, *supra*). First, Section 2 (5) of the Act defines the term, "labor organization," as "any organization . . . in which employees participate and which exists for the purpose . . . of dealing with the employers concerning," *inter alia*, "grievances." Second, the Section 9 (a) proviso which preserves to individuals or groups of employees the right at any time to present grievances is attached to the provision which guarantees to the representative of the majority the right to act as exclusive representative for the purposes of collective bargaining. If Congress had not considered the disposition of grievances to be a function of collective bargaining it would certainly not have included this proviso in the section dealing with collective bargaining. It would have considered that Section 9 (a) did not affect the right of employees to bargain individually with respect to grievances, and *a fortiori*, would not deprive them of the right to present grievances.

b. The legislative history of the proviso to Section 9 (a) of the National Labor Relations Act.

The legislative history of the proviso to Section 9 (a) of the National Labor Relations Act reveals that the term "grievances" as used therein covers a much broader field than the restricted area accorded to it by definition for an entirely different purpose in the Railway Labor Act; that the connotation of the term grievances, as used in the proviso, was that which it possessed in the labor field generally, as synonymous with all complaints which might be the subject of bargaining between employers and employees; that the origin of the proviso lay in the desire to preserve to individuals and minorities the same character of right in industrial democracy as they possessed in political democracy, to petition the Government for redress of grievances; and that the proviso was in no sense intended to reintroduce the evils of individual bargaining into the framework of industrial government. Specifically, Congress intended in the proviso to Section 9 (a) to reserve to individuals and minorities the right to present grievances to the employer for discussion without detracting from the duty of the employer to recognize in the exclusive representative the sole power to contract concerning their disposition.[39a]

When Senator Wagner in 1934, introduced S. 2926, the forerunner of the present Act, the bill contained no provision analogous to Section 9 (a); it did not provide for majority rule and hence made no mention of the right of individuals and minorities to approach the employer. At the hearings on the bill, one of the witnesses suggested specific incorporation of a majority rule provision.[40] Seconding this proposal Professor Edwin E. Witte of the University of Wisconsin, raised the question of what rights should be reserved to individuals and minorities under such a rule. He testified as follows: [41]

[39a] The legislative history as it is here presented has been set forth by the National Labor Relations Board in *Matter of U. S. Automatic Co.*, 57 N.L.R.B. 124, 135, and *Matter of Hughes Tool Co.*, 56 N.L.R.B. 981, 992-994. See also Weyand, Ruth, *Majority Rule in Collective Bargaining* (July 1945), 45 Col. L. Rev. 556, 584-587.

[40] Hearings before Senate Committee on Education and Labor on S. 2926, 73rd Cong., 2d Sess., pp. 227-228.

[41] Hearings on S. 2926, 73rd Cong., 2nd Sess., pp. 243-244.

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> In industrial government, just as in political government, there has to be majority rule, when it comes to actual government. The only type of representation that individuals can have is the right of petition. The right of petition, the right to lay grievances before Congress is a right that any individual and every group must have. Similarly, in industrial government, the right of petition, the right to lay grievances before the employer seems to me is a right that every group should be accorded, and every individual. . . . What is contemplated is merely a right to present a point of view. . . .
>
> It certainly is placing no burden on the employer to meet with representatives of any group of employees that have a grievance or wish to take up some matter with him, but obviously he cannot bargain with every group of employees or with individuals. There cannot be any sort of industrial government whatsoever under those conditions.

Thus the very witness who first proposed insertion in the bill of a provision for the reservation of rights to individuals and minorities under majority rule, recognized that those rights should be no more than the right "to present a point of view"; and argued that only such a right was fully consistent with democratic practices as illustrated by the constitutional guarantee of the right to petition for redress of grievances.

As thereafter reported out by the Senate Committee on Education and Labor, the bill empowered the National Labor Relations Board to give effect to the principle of majority rule and contained a proviso "that nothing in this Act shall be construed to prohibit an employer from discussing grievances with an employee or groups of employees at any time." In describing, in its report, the right resulting to employees from this grant to employers of the right to discuss grievances with them, the Committee said "the minority have a right through representatives or otherwise to present grievances to their employer." [42] Thus, the first use of the term "present" in connection with the right of individuals and minorities, was clearly intended to mean present only for the purpose of "discussing," the term used in the committee bill.

In the interim between this committee report and the introduction by Senator Wagner of S. 1958 on February 21, 1935,

[42] S. Rep. No. 1184, 73rd Cong., 2d Sess., p. 8.

the National Labor Relations Board established under Public Resolution No. 44 [45] adopted the principle of majority rule as more fully described below (*infra*, p. 50). It stated that adoption of this principle did not deny "to any employee or groups of employees the right to present grievances, to confer with their employers, or to associate themselves and act for mutual aid or protection." [46] Commenting on this interpretation of majority rule, Lloyd K. Garrison, Dean of the University of Wisconsin Law School, remarked: "The rights of the minority are amply protected [under majority rule] by assuring them free access to confer with the employer, and to present grievances. The minority, in fact, are benefited by placing upon the employer the duty to bargain exclusively with the majority, for it is only under such circumstances that better terms for the employees, including the minority, are at all likely to be obtained." [47]

When S. 1958, the bill which eventually became law, was introduced, it embodied the interpretation advanced in the 1934 committee report on S. 2926. Since the proviso was cast in terms of rights of employees rather than of rights of employers, it used the word "present." The proviso in full read as follows:

> That any individual employee or group of employees shall have the right at any time to present grievances to their employer through representatives of their own choosing.

In his statement accompanying the bill Senator Wagner described the proviso as according to minority groups the right to "be heard." [48]

Chairman Walsh of the Senate Committee likewise made it clear that the right being preserved to individuals and minorities was the right "to present their views"; [49] that this right extended not only to executive and judicial questions which might arise in the course of administering a collective agree-

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[45] 48 Stat. 1183.
[46] *Matter of Houde Engineering Corporation*, 1 N.L.R.B. (old) 35, 43.
[47] "7-A and the Future," *Survey Graphic*, February 1935, pp. 56-57.
[48] Hearings on S. 1958, 74th Cong., 1st Sess., p. 43. See also 78 Cong. Rec. 12018-12019.
[49] Hearings, p. 323; see also p. 43.

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ment, but also to legislative questions, in the final disposition of which, of course, these groups could have no part. He stated that after as well as before "any agreement for collective bargaining can be entered into [the minority] may be heard by the employer." [48] He further emphasized the broad scope of this right to be heard in the course of a colloquy with Witness Walter Gordon Merritt, who objected that the term "grievances" used in the proviso to describe the matters on which minorities could be heard was "a pretty narrow word," and argued that "present their 'views' would be a far better word, if that is their intention." To this objection the Chairman replied that the text of the proviso meant that "the minority could be heard, too, perhaps not at the time the majority was being heard, but that they could present grievances before or after the contract was made," and insisted that the term "grievances" was appropriate to describe the subject matter as to which employees might be heard because "It is assumed, of course, the thing in collective bargaining is that the employers and employees are dealing with grievances." [49] In response to Merritt's further objection that the proviso "does not permit the others [minorities] to sit in on the collective bargaining end of it," Senator Walsh stated: [50]

> As I understand it, it does not permit them to sign separate agreements, and it does not permit them to be parties to the signature of a contraact, but I do not think there is anything to prevent them from being fully heard in every other step, save that of final execution of the contract.

When Merritt persisted in his objection the Chairman further explained: [51]

> I did not think it was the intent of the proponents of this legislation and I do not think it was the intent of the proponents of this language not to permit groups to present grievances, nor was it intended to debar the minority groups from sitting in if the employer and the majority were willing, but in any event of their not sitting in any

[48] Hearings, pp. 318-319; see also p. 323.
[49] Hearings, p. 323.
[50] Hearings, p. 320.
[51] Hearings, p. 321.

> negotiations that they be separately heard by the employers and their grievances or their suggestions received, and in turn presented by him to the majority group. I did not think there was anything in this bill that prevented any or all groups from getting in to the employer their views and opinions prior to the signing of the contract between the employer and the majority group of employees.

Further explaining the intent of the proviso that no "minority group should be denied the right to present grievances, if that word is there, or present their views," Senator Walsh posed a hypothetical case.[52]

> Suppose a contract is entered into by a majority of the employees and an employer, and it omitted to properly protect or properly settle some great injuries that the workmen outside the plant, who have charge of the property of the company, who were the gardeners and the repairmen on the outside of the building, let us say, and they are employees, of course, of the company, why should not they be permitted before the agreement is made, or after the agreement is made, whether they are of a minority union or an independent union, or only just ordinary employees, to press upon the employer the rights as they see them, and urge that in any contract that is made that proper stipulation should be made for their working hours, and the definition of the conditions under which they work, either before or after?

In a colloquy with another witness Senator Walsh stated: [53]

> The bill also provides that . . . your employees . . . can elect representatives . . . and these representatives will be the spokesmen for the other employees in meeting with you for the purpose of settling grievances that may arise. The law would require you to meet them and in good faith discuss grievances . . .

In the course of hearings before the House Committee on Labor,[54] Chairman Connery expressed himself as being "leery" of the proviso as it then stood for two reasons, first, because

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[52] Hearings, p. 324.
[53] Hearings, p. 516.
[54] The hearings were held on H. R. 6288, 74th Cong., 1st Sess., the companion Bill to S. 1958, introduced by Representative Connery on February 28, 1935.

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it might be construed to permit employers to settle grievances with minority groups, and second, because it permitted minorities to present grievances through representatives other than the representative chosen by the majority, a condition which would permit minority representatives to claim credit for suggestions originally advanced by them. Chairman Connery conceived that this would enable employers to build up company unions.

Addressing himself to the first of these problems he said that "he would like to see it so that after they [the minority] present their grievance then the matter must be taken up by the majority with the boss of the plant." [55] He proposed a further proviso as follows: [56]

> That if such grievances are presented to the employer, these grievances will be taken up by the employer and the representatives of the majority and settled.

This amendment would have imposed upon the employer the duty of referring all grievances to the exclusive representative whether or not the employer proposed taking any action on them. It would also have imposed a duty on the exclusive representative to participate with the employer in the settlement of all grievances. Objecting to imposition of such duties upon employers and unions, William Green, president of the American Federation of Labor, who was then on the witness stand, stated:

> What we wish is that it [the proviso] might state clearly that the individual employee shall be accorded the right to present grievances to his employer for adjustment. *That is about as far as it should go.* (Italics supplied.)

Chairman Connery replied: [57]

> I agree with you.

Representative Eagle, concerned with the same problem, suggested that in order to avoid the interpretation that individuals would have the right to contract with employers for the settlement of grievances, the proviso be omitted entirely,

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[55] Hearings, p. 210.
[56] Hearings, p. 211.
[57] Hearings, p. 211.

thus leaving the individual with the right to "make representations" which, he said, they would retain in any event since the Act nowhere denied it. When Mr. Green assured him that individuals retained only that right under collective bargaining, Congressman Eagle said, "Then you do not confuse the meaning of this [the proviso as written], and you will not have another Richberg decision?" [58]

Similarly, Congressman Griswold, another member of the Committee, posing the case of an individual who claimed that he had not received overtime payments in accordance with the provisions of a collective agreement for work previously performed, warned that if: [59]

> that man goes and *bargains individually* and not through the established procedure, and the *established organization,* that man has got to *break down your system by doing it alone.* (Italics added.)

With reference to the second problem, whether individuals and minority groups should be permitted to present grievances through representatives other than the majority representative, Chairman Connery remarked that if such representation were permitted, "You inject your company union just the same." [60] A similar view of the danger of permitting representation by any one other than the majority choice was taken by Congressmen Wood and Griswold.[61] During the testimony of Secretary of Labor Frances Perkins, Chairman Connery again sought to eliminate the danger of building up company unions, which these committee members deemed to lurk in that portion of the proviso which conferred upon minorities the right to select "representatives of their own choosing" for the purpose of presenting grievances. Secretary Perkins then read a proposed amendment to the proviso which eliminated the words "through representatives of their own choosing" and stated that she believed that this amendment would "take care of" the problem raised by the Chairman. When Chairman

[58] Hearings, pp. 211-212. As interpreted by Donald Richberg, General Counsel of the National Recovery Administration, Section 7 (a) of the N.I.R.A. permitted individual bargaining. (See *infra*, pp. 48-49).
[59] Hearings, p. 222.
[60] Hearings, p. 211.
[61] Hearings, pp. 211, 223.

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Connery further inquired whether it was her understanding that under the proviso as thus amended, if a minority "went to the employer and presented a grievance, the collective bargaining proposition would still have to be taken care of by the majority." Secretary Perkins replied, "That is my understanding." [62]

The Senate Committee in reporting the bill incorporated substantially the amendment proposed by Secretary Perkins.[63] This amendment was adopted by Congress [64] and appears in the bill as it was finally enacted.

3. The legislative history of both Acts respecting collective bargaining

Not only does the legislative history of the proviso itself reveal that Congress intended to preserve to the bargaining agent exclusive power to dispose of grievances by agreement with the employer but the legislative history of the adoption by Congress of the system of collective bargaining and the principle of majority rule, in the railway field as in industry generally, establishes conclusively that the proviso could not have been intended to reserve to individuals or minorities any portion of this power. In fashioning the Railway Labor Act and the National Labor Relations Act Congress clearly recognized that it was establishing a system of industrial government. It realized further that adoption of the governmental system of collective bargaining required rejection of every vestige of the antithetical system of individual bargaining. Although the Brief of the United States, p. 4, admits that the settlement of issues arising out of disputes concerning interpretation or administration of collective agreements by negotiation between individual employees and their employers is individual bargaining, the brief makes no mention of the legislative history which shows that Congress intended to outlaw all individual bargaining once the majority had chosen a representative. The omission is presumably traceable to the government's realization that this legislative history destroys com-

[62] Hearings, pp. 301-302.
[63] S. 1958, 74th Cong., 1st Sess., as reported May 2, 1935.
[64] 79 Cong. Rec. 7651.

pletely the government's entire argument in favor of individual bargaining as to grievances.

When Senator Wagner introduced S. 2926 in 1934 (*supra*), he said:[65]

> No real advocate of collective bargaining would argue that a worker should be free to bargain individually even after the overwhelming majority of his coworkers desire an agreement covering all.

At the hearings before the House Committee on Labor on the 1935 bill he stated, "Freedom for the individual worker . . . from the orderly processes of determining questions which prevail in business and in public affairs . . . is the trade name for exploitation." [66] As Francis Biddle noted in his testimony on the 1935 bill, "It is . . . academic and a little silly" to believe that individuals and minorities receive any protection by being permitted to bargain for themselves. "The purpose of the bill is to give workmen power to bargain effectively by collective action. It is obvious that they cannot do better by individual action." [67] Commissioner Eastman, testifying on the 1934 amendments to the Railway Labor Act, pointed out:

> The theory of collective bargaining is that employees cannot deal on equal terms with the employer unless they organize. They must deal collectively rather than individually.[68]

In the National Labor Relations Act Congress expressly found that this "inequality of bargaining power between employees . . . and employers" existed and "that protection by law of the right of employees to . . . bargain collectively safeguards commerce . . . by restoring equality of bargaining power between employers and employees" (Section 1). In the report which accompanied the bill the Senate Committee recognized that "the relative weakness of the isolated wage

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[65] 78 Cong. Rec. 3443; see also 79 Cong. Rec. 7571.

[66] Hearings on S. 1958, 74th Cong., 1st Sess., p. 46; see also Hearings on S. 2926, 73rd Cong., 2d Sess., pp. 8-9; Hearings on H. R. 6288, 74th Cong., 1st Sess., pp. 16, 18.

[67] Hearings, p. 81, see also the testimony of H. A. Millis, pp. 180-181, and of Charlton Ogburn, p. 151.

[68] Hearings before the Senate Committee on Interstate Commerce on S. 3266, 73rd Cong., 2nd Sess., p. 146.

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earner caught in the complex of modern industrialism has become such a commonplace of *our economic literature* . . . that it needs no exposition." (Italics added).[69] It asserted that "Congress . . . must play some part in redressing this inequality of bargaining power," [70] and concluded that "the desirability of collective bargaining as it bears upon . . . equality of bargaining power, is sufficiently well established . . . to justify its affirmance in adequate and permanent Federal law." [71] Accordingly, it stated its "objective . . . to promote . . . equality of bargaining power by encouraging the practice of collective bargaining." [72] In commenting upon its decision that collective bargaining should be instituted whenever a majority of the employees so decided, it declared: [73]

> Majority rule carries the clear implication that employers shall not interfere with the practical application of the right of employees to bargain collectively through chosen representatives by bargaining with individuals or minority groups in their own behalf, after representatives have been picked by the majority to represent all.

Similarly, the House Committee in its report noted that it would be "an act of interference (under Section 8 (1)) for an employer, after representatives have been so designated by the majority, to negotiate with individuals or minority groups in their own behalf on the basic subjects of collective bargaining." [74]

It declared that "the bill seeks to redress an inequality of bargaining power by . . . bringing about a general acceptance of the orderly procedure of collective bargaining under circumstances in which the employer cannot trade upon the economic weakness of his employees." [75]

The question whether any individual bargaining should be permitted once collective bargaining was established had been a vigorously contended issue for two years prior to the passage

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[69] S. Rep. No. 573, 74th Cong., 1st Sess., p. 3.
[70] S. Rep. No. 573, 74th Cong., 1st Sess., p. 3.
[71] *ibid.*, p. 4.
[72] *ibid.*, p. 6.
[73] *ibid.*, p. 13.
[74] H. Rep. No. 1147, 74th Cong., 1st Sess., p. 20.
[75] *ibid.*, p. 16.

of the National Labor Relations Act. In introducing the 1934 bill (*supra*) Senator Wagner said: [75a]

> The second defect in Section 7 (a) has turned upon a question of interpretation. The law says that employees shall be permitted to choose their own representatives. This has been read to mean that even after the overwhelming majority in a plant desire a collective agreement covering all, the employer shall be free to deal individually with workers who want to make individual agreements.

The events referred to in this statement may be summarized briefly. The National Industrial Recovery Act, 48 Stat. 195, was passed on June 16, 1933. Section 7 (a) of that Act read in part as follows:

> Every code of fair competition, agreement and license approved, prescribed or issued under this title shall contain the following conditions:
>
> (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

In August of 1933, the President established the National Labor Board to administer this provision.[76] In Executive Order No. 6580, issued February 1, 1934, the President, in order to "provide for and direct the enforcement of certain provisions of Section 7 (a)" empowered this Board to hold elections to enable employees "to choose representatives for the purpose of collective bargaining," and to publish the names of those "designated to represent all the employees . . . for the purpose of collective bargaining . . ." The order further provided that if any employer declined to recognize or deal with representatives so selected the Board should report such refusal to the Administrator for Industrial Recovery. Two days later, on February 3, 1934, the Administrator, Hugh S. Johnson, and his General Counsel, Donald R. Richberg, issued a joint statement to the effect that this Executive Order

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[75a] Hearings before Senate Committee on Education and Labor on S. 2926, 73rd Cong., 2d Sess., pp. 8-9, 17. See also 78 Cong. Rec. 3443.

[76] Lorwin, Lewis L. and Wubnig, Arthur, *Labor Relations Boards* (Washington, D. C., 1935), pp. 91-94.

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permitted individual employees and minority as well as majority groups to organize, select representatives, and bargain collectively (N.R.A. Release No. 3125). The National Labor Board promptly rejected this interpretation. In a decision issued on March 1, 1934, it construed the order as squarely adopting the principle of majority rule.[77] The Board held that the employer should bargain solely with the union which had received 353 votes in an election in which another union had received 325 votes, and in which 36 employees did not vote. An employer member dissented, stating that each union should represent the employees who voted for it and that the company should bargain individually with the 36 employees who did not vote.[78]

The divergence of views expressed by the majority of the National Labor Board on the one hand and the dissenting member of the Board, on the other, in the *Denver Tramway* case, reflected the conflict between the status accorded to collective bargaining representatives in trade union philosophy and their status at common law. The employer member's insistence upon the right of minority groups to deal through representatives other than those selected by the majority, and upon the right of individuals to bargain for themselves if they so desired whether or not a majority had indicated a desire to bargain collectively, would have meant adherence to the theory that the authority of a collective bargaining representative was no greater that that of an agent at common law, whose powers stemmed solely from the authorization of each individual or group whom the agent undertook to represent. The decision of the Board, on the contrary, sought to fashion a legal theory consonant with the philosophy of collective

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[77] *Matter of Denver Tramway Corp.*, 1 N.L.B. 64.

[78] On March 3, 1934, an Executive Order (No. 6612-A) of February 25, 1934, was made public, in which the President amended the Executive Order of February 1, by substituting as the enforcement agency for decisions of the National Labor Board, the Department of Justice, and the Compliance Division of the National Recovery Administration in place of the Administrator for National Recovery. Lorwin and Wubnig, op. cit. *supra*, note 76, pp. 108-111. This apparent victory for the view expressed by the National Labor Board as against that expressed by the Administrator was short lived. On March 25, 1934, the President announced the terms of settlement of a strike in the automobile industry among which was the adoption of a system of a proportional representation.

bargaining, a philosophy which rejected concepts of agency in favor of concepts of industrial government. Acceptance by the majority of the Board of the view that once collective bargaining is established in an industry the employees can act only through the representative selected by the majority on all matters affecting the employment relation was expressed as follows: [79]

> The [Union] was selected by a majority of those voting, both as the agency through which the employees of the Denver Tramway Corporation would collectively bargain with the management in negotiating an agreement and in the settlement of any disputes which may arise between it and its employees. Any agreement reached . . . must apply alike to all employees of the company.

As noted above (*supra*, pp. 39-40), in June 1934, Congress enacted and the President signed, Public Resolution No. 44, authorizing the President to establish Boards to investigate controversies arising under Section 7 (a). Such Boards were empowered to conduct elections among employees "to determine by what person or persons or organization they desire to be represented in order to insure the right of employees to organize and to select their representatives for the purpose of collective bargaining as defined in Section 7 (a)." Pursuant to this resolution the President issued Executive Order No. 6763 on June 29, 1934, creating a National Labor Relations Board.[80] Early in its history the Board, in Matter of *Houde Engineering Corp.*, 1 N.L.R.B. (old) 35, decided July 24, 1934, approved the views enunciated by its predecessor in the *Denver Tramway* case and held that the guarantees of Section 7 (a) could not be effectuated unless the employer were required to recognize exclusive power to bargain on be-

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[79] *Matter of Denver Tramway Corp.*, 1 N.L.B. at p. 64.

[80] The executive order which established the Textile Labor Relations Board (No. 6858, issued September 26, 1934) empowered that Board to hold elections and provided that the representative selected by a majority "shall be accepted for the purpose of collective bargaining, as the representative . . . of the employees eligible to participate in the election, without thereby denying to any individual employee or group of employees the right to present grievances, to confer with their employers, or otherwise to associate themselves and act for mutual aid or protection." The Executive Order establishing the National Steel Labor Relations Board was similarly worded (No. 6751, issued June 28, 1934).

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half of all the employees in the representative selected by the majority.

When the bill which became law was pending in Congress in 1935 (*supra*, p. 40) both William Green, president of the American Federation of Labor, and John L. Lewis, president of the United Mine Workers of America, reviewed at length the controversy created by the Richberg-Johnson decision and pointed out that one of the purposes of the bill was to put an end to this controversy [81] and to thwart forever the "tendency to revert to the principle of individual contracts as between employers and employees." [82] The danger of a possible misinterpretation of the proviso which would permit continued survival of individual bargaining to any extent disturbed Congressman Eagle, who requested assurance that the proviso, as originally worded (see *supra*, p. 40) could not result in "another Richberg decision." [83] In favorably reporting the bill both the Senate and House Committees vigorously defended their adoption of the rule of exclusive representation through the majority choice; the House Committee quoting at length from the *Houde Engineering* decision, with approval.[84]

Having rejected, as we have demonstrated above, the theory that power to bind employees in negotiations with employers could or should be divided among as many representatives as the employees individually might select, and having adopted instead the theory of unitary dealing by an exclusive representative, the Congress turned to political analogy to derive the principle by which that representative should be ascertained. Majority rule, it said, is "sanctioned by our governmental practices . . . and by the whole philosophy of democratic institutions." S. Rep. No. 573, 74th Cong., 1st Sess., p. 13. H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21. Thus, it realized as had the Railroad Labor Board, as early as 1921, that once it is decided that employees are to act through a single representative, "it necessarily follows, under our system of govern-

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[81] Hearings before the Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess., pp. 118-119, 190-195.

[82] *Ibid.*, at p. 195.

[83] Hearings before the House Committee on Labor, on H. R. 6288, 74th Cong., 1st Sess., p. 212.

[84] S. Rep. No. 573, 74th Cong., 1st Sess., pp. 13-14; H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 20-22.

ment, that a majority of such employees would have the right to designate their representatives." [55] Witnesses before Congressional Committees considering the Railway Labor Act and the National Labor Relations Act who supported majority rule had uniformly advanced the same justification for its adoption.[56]

Reliance upon this analogy stemmed from acceptance of the view of students of labor relations, described above (*supra*, pp. 13-20), that the fixing of terms and conditions of employment is industrial government. Commissioner Eastman, testifying on the 1934 amendments to the Railway Labor Act, said: [57]

> The minority ought to have every opportunity to air their views. As one who has dissented frequently in the past, I am strong for that; but yet I believe in the rule of the majority. Government cannot be subdivided into factions—and the labor union is really a form of government.

Similarly, Professor Witte, in his testimony on the Wagner Bill in 1934, referred repeatedly to "industrial government" and to "making laws for the industry through the joint action of employer and employee." He said, "If you have in mind making some form of industrial government you must recognize that there cannot be bargaining unless you recognize that fundamental principle of democracy, majority rule." [58] As noted above (pp. 38-39), his suggestion that employees be permitted to present grievances was justified explicitly by reference to the analogous right of citizens in a democracy.

Congressional decision that the majority choice should be

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[55] *Railway Employees Department* v. *Pennsylvania System*, 2 R.L.B. 207, Decision No. 218.

[56] See, e.g. testimony of Joseph B. Eastman, in Hearings before House Committee on Interstate and Foreign Commerce on H.R. 7650, 73rd Cong., 2nd Sess., pp. 33-34; testimony of Edwin E. Witte in Hearings before Senate Committee on Education and Labor, on S. 2926, 73rd Cong., 2nd Sess., pp. 243-244; testimony of Frances Perkins, in Hearings before House Committee on Labor, on H.R. 6288, 74th Cong., 1st Sess., pp. 278-279.

[57] Hearings before the Senate Committee on Interstate Commerce, on S. 3266, 73rd Cong., 2nd Sess., p. 146.

[58] Hearings before the Senate Committee on Education and Labor, S. 2926, 73rd Cong., 2nd Sess., pp. 243-244.

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the exclusive representative of the employees for the purpose of dealing with the employer necessarily rejected not only simultaneous bargaining with minority representatives but also simultaneous bargaining with individual employees or employee groups. This rejection, we submit, extends to the making of agreements disposing of judicial and administrative as well as legislative matters. The considerations advanced by Congress to show that any system which would detract from the exclusive power of the majority choice would be impractical and would moreover fail to accomplish the paramount purpose of restoring equality of bargaining power apply with full force to the negotiation of agreements disposing of judicial and administrative matters between employers and employees individually whether or not the exclusive representative also participates.

In its report on the bill which became the National Labor Relations Act the House Committee quoted with approval from the *Houde Engineering* decision, *supra:*[80]

> It seems clear that the company's policy of dealing first with one group and then with the other resulted, whether intentionally or not, in defeating the object of the statute. In the first place, the company's policy inevitably produced a certain amount of rivalry, suspicion, and friction between the leaders of the committees. . . .
>
> This vision of an employer dealing with a divided committee and calling in individual employees to assist the company in arriving at a decision is certainly far from what section 7 (a) must have contemplated in guaranteeing the right of collective bargaining. But whether or not the workers' representation by a composite committee would weaken their voice and confuse their counsels in negotiating with the employer, in the end whatever collective agreement might be reached would have to be satisfactory to the majority within the committee. Hence the majority representatives would still control, and the only difference between this and the traditional method of bargaining with the majority alone would be that the suggestions of the minority would be advanced in the presence of the majority. The employer would ordinarily gain nothing from this arrangement if the two groups were united, and if they were not united he would gain only

[80] H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 20-21.

> what he has no right to ask for, namely, dissension and rivalry. . . .

That Committee also noted that, "It would be undesirable if this basic scale should result from negotiation between the employer and unorganized individuals or a minority group, for the agreement probably would not command the assent of the majority and hence would not have the stability which is one of the chief advantages of collective bargaining." [50] In view of the precedent creating nature of agreements disposing of justiciable matters it is equally important that such agreements be acceptable to, and hence negotiated solely with, the majority. Were they not so negotiated the majority would be forced either to require the employer to ignore them in the future thus introducing elements of instability and discrimination or to accept a settlement which does not reflect the majority view and carry the weight of the bargaining position of the group as a whole.

The Senate Committee made the point that unitary dealing was desirable also because employers "have found it more conducive to harmonious labor relations to negotiate with representatives chosen by the majority than with numerous warring factions." [51] The disruption which the Committee sought to avoid would be invited if employers were required to dispose of justiciable issues in joint conference with the exclusive representative and employees who were at odds with the representatives' position. As stated by Professor H. A. Millis, later Chairman of the National Labor Relations Board, at the 1935 hearings on the bill which became the National Labor Relations Act: [52]

> Nothing can be said for dealing with first one group and then with another, except that it makes it possible for the employer to play off one group against another and thus defeat real collective bargaining. Furthermore, any such

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[50] *Ibid.*, p. 20.

[51] S. Rep. No. 573, 74th Cong., 1st Sess., p. 13.

[52] Hearings at the Senate Committee on Education and Labor, on S. 1958; 74th Cong., 1st Sess., pp. 180-181. See also the testimony of Professor Witte, *supra*, pp. 38-39, and the testimony of Commissioner Joseph B. Eastman before the House Committee on Interstate and Foreign Commerce, on H.R. 7650, 73rd Cong., 2nd Sess., pp. 33-34.

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practice means instability, jealousy and nuisance in administration.

The history of the two Acts shows that Congress fully recognized that adoption of the theory of exclusive representation through the choice of the majority raised questions concerning the scope of the rights of individuals and minorities and the manner in which those rights should be protected. It shows further that Congress considered that minorities had the right to obtain from the exclusive representative equal protection; the right to attempt to become the majority; and the right to present their views to the employer and the exclusive representative; that is the same protection accorded individuals and minorities in political democracy. It should be noted, of course, that the creation and protection of these rights grew out of the adoption of majority rule; under individual bargaining the employees possessed no such rights, and the rights which they did theoretically possess, they were helpless to exercise (*supra*, pp. 14-17). Congress considered that the advantages which would be derived by minorities from the united action of all the employees through the exclusive representative more than compensated for the deprivation of the theoretical right to engage in individual bargaining. Protection of individuals and minorities then, under the system of collective bargaining, stemmed not from a desire to compensate individuals and minorities for the loss of such rights, but to insure within the industrial democracy that Congress was creating the protection for minorities and individuals which centuries of political development had embedded in democratic practice.

The House Committee expressly noted that under the National Labor Relations Act, "Since the agreement made [by the exclusive representative] will apply to all, the minority group and individual workers are given all the advantages of united action." [46] And the Senate Committee noted that minorities would necessarily derive this advantage from the action of the exclusive representative because that representative

[46] H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21. See also S. Rep. No. 573, 74th Cong., 1st Sess., p. 13.

"will be quite powerless to make agreements more favorable to the majority than to the minority." [32]

The second right, the right to attempt to become the majority, was also protected by Congress (Railway Labor Act, Section 2, Third and Ninth; N.L.R.A. Sections 1, 7, and 9). "The minority is protected by the fact that it is part of the constituency to which the representative must look for continued authority." At the hearings on the 1934 amendments to the Railway Labor Act, Commissioner Eastman was asked by Congressman Wolverton "what provision is made for the individuals who decide not to join any union? Do they have any representation under this bill?" He replied: "They have the right to vote, of course, for their representatives; but the representation would be decided by the majority." [33] The Commissioner had earlier indicated his view that "The will of the majority ought to govern; but there ought to be ample means so that the minority can have a chance to persuade others to their way of thinking and so that there can be an election, if they succeed in converting their minority into a majority." [34]

These two basic methods of advancing the interests of indi-

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[32] S. Rep. No. 573, 74th Cong., 1st Sess., p. 13; see also, H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21; see also, Testimony of Francis Biddle before Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess., pp. 81-82. In an article in *"Survey Graphic,"* dated February, 1935, entitled *7-A and the Future*, Dean Lloyd K. Garrison of the University of Wisconsin, commented as follows: "The minority, in fact, are benefited by placing upon the employer the duty to bargain exclusively with the majority, for it is only under such circumstances that better terms for the employees, including the minority, are at all likely to be obtained" (pp. 56-57).

[33] The Court stated in its opinion that—

> Congress was concerned primarily with differences between the carrier and the employees, not with differences among the latter or between them, or some of them, and the collective agent. The statute therefore was not drawn with an eye levelled to these problems *except as to choice of representatives*, cf. Sec. 22 Fourth; Sec. 2 Ninth; . . .

(Slipsheet, p. 21, n. 37; italics supplied). We submit that the Act was levelled at these problems and that it disposed of them by the very method mentioned; that is, by providing that differences within the employee group should be resolved by the ballot box.

[34] Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 7650, 73rd Cong., 2nd Sess., pp. 35-36.

[35] *Ibid*, pp. 33-34.

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viduals and minorities were supplemented by the grant of the right to present grievances which Congress considered merely "added protection." [98]

It should be borne in mind that Congress did not permit its concern over the welfare of individuals and minorities to outweigh its concern for the welfare of the employee group as a whole. Its approach was that of Secretary Perkins, who said: [100]

> It is common in our thinking that the majority shall rule. Of course, under that theory many minorities do not find themselves being represented, but liberties have not been greatly impaired by the rule of the majority, and we have made progress toward democracy with that, recognizing always that there are unrepresented minorities on the political as well as the economic side.

Similarly, Senator Wagner said,[101]

> . . . democracy in industry must be based upon the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guarantee of political liberty that mankind has yet discovered.

C. The Terms of the Railway Labor Act respecting individuals

While the Railway Labor Act contains no provision analogous to that contained in Section 9 (a) of the National Labor Relations Act, there is reason to believe that Congress did not by this omission intend to deny to individuals and minorities the right to present grievances. Section 2, Fourth of the Railway Labor Act provides:

> . . . That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Attached as it is to the Section which prohibits carrier in-

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[98] H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21. See also, Testimony of E. E. Witte, Hearings before Senate Committee on Education and Labor, 73rd Cong., 2nd Sess., on S. 2926, pp. 243-244.

[100] Hearings before the House Committee on Labor on H.R. 6288, 74th Cong., 1st Sess., pp. 278-279.

[101] 79 Cong. Rec. 7571, 74th Cong., 1st Sess., May 15, 1935.

terference with the right of employee self-organization, *inter alia*, by the use of "funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining," this proviso like the analogous proviso to Section 8 (2) of the National Labor Relations Act,[109] as the Court, in its opinion conceded (slipsheet, p. 19), was intended primarily to preserve the legality of arrangements pursuant to which union representatives were paid by the employer at regular rates for the time they spent in negotiations with the employer; arrangements which, in the absence of such a proviso would be condemned as constituting contributions to the labor organization or to its representatives. While it might, therefore, be argued that extension of the privilege to employers to confer with employees individually was intended to apply only where a majority had not selected an exclusive representative, the provision need not so be read. We believe that the proviso may be taken to indicate that Congress envisioned conferences between employers and employees individually after as well as before selection of an exclusive representative, and that it wished to permit such conferences to be held on the employer's time.

In this view the proviso to Section 2, Fourth, of the Railway Labor Act assures to individuals and minority groups the same character of right as is accorded them by the provisos to Sections 9 (a) and 8 (2) of the National Labor Relations Act. The proviso to Section 2 Fourth, of course, does not in any manner limit the subject of conferences between employers and individual employees; the word "grievances" nowhere appears therein. Clearly, employees were given the privilege of conferring with the employer on any and all subjects, legislative as well as executive and judicial, both before and after a collective bargaining agreement was executed. Employers were permitted to compensate them for the time spent in such

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[109] Section 8 (2) provides that it shall be an unfair labor practice for an employer "To dominate or interfere with the formation or administration of any labor organization to contribute financial or other support to it: *Provided*, That . . . an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

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conferences, without distinction as to subject. Equally clearly, therefore, the right to "confer" could not have been intended to include the right to contract with the employer. Had such a right been envisaged the door would have been opened once again to individual contracts on all subjects over which the collective bargaining representative had been given exclusive authority.

We submit that the proviso to Section 2, Fourth, cannot be construed as detracting from the power of the exclusive representative to settle with the employer, and the duty of the employer to settle only with the exclusive representative, all matters growing out of the employment relation, but that it should be construed as permitting individuals under the Railway Labor Act, as under the National Labor Relations Act, to present grievances (as that term is used in that Act), to their employer, and as permitting the employer to discuss the grievances so presented with the employees on company time.

This view of the right reserved to individuals and minorities by the proviso to Section 2 Fourth, particularly in regard to judicial and administrative issues, finds further support in the Act's provisions, contained in Section 3, relating to the functioning of the grievance machinery and to the composition and function of tribunals to be created as the ultimate repositories of power in grievance adjustments.

The Act recognizes, without equivocation, that collective agreements are bi-party contracts between carriers and exclusive bargaining representatives.[109a] This recognition, the final requisite to the creation of a legal framework appropriate to the practice and philosophy of collective bargaining (see p. 30, *supra*), is reflected in the provision for the creation of the National Railroad Adjustment Board. Membership on this Board, created to serve as a final tribunal for the adjustment of grievances which remain unsettled after all other stages of the grievance machinery have been exhausted, is divided equally between representatives designated by the national

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[109a] See the report of the emergency fact-finding board, quoted by Commissioner Eastman at the Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 7650, 73rd Cong., 2nd Sess., p. 46.

labor organizations "organized in accordance with the provisions of Section 2 of this Act" and representatives designated by the employers (Section 3, First (a), (b), and (c)). Thus, Congress expressly provided that at the final stage of grievance adjustment the power to settle and decide grievances should be vested jointly in the exclusive representative and the employer. That Congress deliberately chose to reserve to the exclusive representative and the employer acting jointly the power to settle grievances at all stages becomes even more apparent in the light of Section 2 Sixth and Section 3 Second of the Act. The former provides that:

> . . . That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

The latter Section provides that:

> Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section.

By thus permitting exclusive representatives and employers at any time to substitute for the statutory specifications as to the manner of handling grievances at the initial stages, specifications of their own, and for the statutory Adjustment Board of a grievance tribunal of their own, Congress emphasized not only that it viewed grievance adjustment purely as a matter for joint action by the employer and the exclusive representative but also that it had created no rights under the provisions of the Act establishing the Adjustment Board which could not be altered or eliminated by agreement between the employer and the statutory representative.

In this final stage in the grievance procedure, provided by Congress, decisions are made solely by the employer and employee representatives who compose the tribunal; and this is so regardless of the rights of individual employees, if any, to present and prosecute cases before the Adjustment Board. To hold, as did the Court in its opinion, that although Congress

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so clearly reaffirmed the power of the exclusive representative and the employer, acting through their delegates to the Adjustment Board, alone to settle in the final stage grievances which remained unadjusted at prior stages, it nevertheless at the same time denied to the employer and the exclusive representative the power to settle grievances at prior stages without the concurrence of the employees involved, seems to us unwarranted. Such a holding, we submit, is justified neither by logic, the terms of the Act, nor by relevant policy considerations.

In addition to Section 2, Fourth, which explicitly provides that the representative selected by the majority shall act as exclusive representative for the purpose of settling grievances (*supra*, p. 57); to section 2, Second, which provides that grievances shall if possible be decided by the employer and the exclusive representative *(supra)* and Section 2 Sixth which imposes a duty upon the exclusive representative to set a time for meeting with the representatives of the carrier for the purpose of deciding grievances, Section 3 (i) provides that

> . . . disputes arising out of grievances shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board . . .

This provision, that before grievance disputes may be submitted to the Adjustment Board they must have been handled by the parties "in the usual manner up to and including the chief operating officer of the carrier," again demonstrates Congressional reliance upon full utilization of the machinery of collective bargaining in all its phases to accomplish adjustment of grievances. The purpose of this provision, as Mr. Richberg pointed out in his testimony on the 1926 bill which contained the same phrase, was

> . . . simply this, . . . that conference is not to include, in these grievance disputes merely the initial conference, for instance, discussion between a foreman and a committee of employees, or superintendent of motive power, and a committee, if the machinery provided by the road provides

> for an appeal from that officer's ruling to some higher official, so that until the road itself has exhausted the machinery it has provided for handling these disputes, then they should not be taken to an adjustment board, but when the ordinary, regular machinery established for dealing with these disputes has been utilized, then the dispute is expected to go to an adjustment board.[103]

Testifying concerning the "usual manner" of handling grievances on the railroads, Mr. W. N. Doak, Vice President and National Legislative Representative of the Brotherhood of Railroad Trainmen, said:

> I will state for my own organization, because I am more familiar with it than I am with any other, and I have served in every capacity, from local chairman to that of vice president of that organization, that first of all, if a man has a grievance he must submit it to his local lodge and get the majority of the members present at that meeting employed on the division or district where he is employed to sanction it before it can be taken up by his local committee. That is the first thing. Secondly, it is referred to the local committee and they have a right to amend the grievance or handle it in any way they see fit and report back to the local lodge. The lodge can drop the case or it may be referred to the general committee, which general committee consists of the local chairmen from the respective divisions, who, with the officials of the railway, elect their own chairman.
>
> It can be handled by that general committee or thrown out as they see fit. Under this machinery, after it has gone through all this routine the case can go to the general manager, or the chief operating officer of the railroad, and with him confe:ences, be held and if the parties could not agree, an appeal to the president may be made, if it is wanted or, to the highest officer of that railroad before any of the machinery of this bill would be involved. Then if it was a grievance it would go to the adjustment board.[104]

These descriptions of the grievance adjustment procedure developed under collective bargaining in the railroad field by

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[103] Hearings before the House Committee on Interstate and Foreign Commerce, on H.R. 7180, 69th Cong., 1st Sess., p. 67.

[104] Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 7180, 69th Cong., 1st Sess., pp. 202-203. Cf. Garrison, The National Railroad Adjustment Board, A Unique Administrative Agency, 46 Yale, L. J., 567, 577; Hoxie, op. cit. *supra*, note 1, pp. 270-271.

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1926, make it perfectly clear that the power to settle grievances at all stages prior to Adjustment Board proceedings is vested in the appropriate officers designated by the carrier and by the exclusive representative. The witnesses contemplated, and their view was patently adopted by Congress, that if these officers settled a grievance, that concluded the matter, and the grievance could not thereafter be presented to the Adjustment Board. Moreover, Mr. Doak's testimony reveals that it was fully understood that settlements made between the officers of the exclusive representative and of the employer at any stage of the grievance machinery, would be binding upon the employees involved whether they were pleased with the settlement or not, just as decisions of the Adjustment Board are binding upon them whether they agree or not. The government in taking the position that "usual manner" includes presentation by individuals (Government's Brief, pp. 7-8, 25, 45-49) relies on a decision by the district court in *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338. The record in that case fails to disclose any evidence that individual employees, as opposed to "minority" unions, ever presented their own grievances. As to minority unions, it only showed presentation by national organizations on behalf of their members when working in an overlapping craft. Even where this was done, the "minority" union acted with the acquiescence and approval of the majority union, to whom the "minority" union accorded similar privileges when their positions were reversed (R. 216-218, 231-235, 738-743).

Had Congress contemplated that individuals and minority groups were to be accorded the right to participate in the settlement of grievances affecting their interests the statute would necessarily have contained provision for participation by such employees in the deliberations and decisions of the Adjustment Board, as well as provision for participation by them in the deliberations and decisions of the officers of the exclusive representative and the employer at earlier stages. The statute contains no such provision for individual participation in grievance adjustment, and the legislative history of the "usual manner" phrase, set forth in detail in the Brief filed on behalf of the Railway Labor Executives Association in sup-

port of the Petition for Rehearing in the instant case, pp. 4-27, demonstrates conclusively that no intention to sanction such procedure can be attributed to Congress.

In accordance with its view that the collective bargaining agreement is a bi-party contract, Congress, throughout the Act, and particularly in Sections 3 First (i) and (j), in discussing proceedings before the Adjustment Board, utilized the term "parties" to refer to the employer and the statutory representative. To underline this usage Congress made it clear that proceedings before the Adjustment Board were to be bi-party, not tri-partite proceedings. Thus Section 3 First (i), *supra*, provides that "disputes may be referred by petition of the parties or by *either* party to the appropriate division of the Adjustment Board" (italics added). The genesis of this provision (see Brief on behalf of Railway Labor Executives Association, *supra*, pp. 4-18) in the Transportation Act of 1920 shows that Congress could not have considered that individuals would be "parties" to proceedings before the Adjustment Board. If, on the contrary, it had been contemplated that individuals would be "parties" in such proceedings, it would follow, in view of the bi-party character of the proceedings, that statutory representatives could not be parties, and could not bring cases before the Adjustment Board, a result which would be completely incompatible with the statute's purposes and structure.

Section 3 First (j) which sets forth the nature of proceedings before the Adjustment Board, the manner in which parties may appear at hearings, and the duty of the Board to give due notice of all hearings is fully consistent with the view set forth above. It provides:

> Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

Once again it should be noted that if the term "parties" in this Section is read as referring to the employer and individ-

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ual employees the statute would contain no provision for appearances by or notice to the statutory representative. If, on the other hand, the term "parties" is read as referring to the employer and the exclusive representative, the language is easily explained. The use of the term "in person" of course, is common in legislation dealing with the manner of appearance before judicial and quasi-judicial tribunals. Its usage in the Act would have been dictated by the possibility, if contrary to fact, it were no more than a possibility, that a carrier involved in such a dispute would be individually owned. In fact the statute defines "carrier" as including "any individual or body . . . when in the possession of the business of any such 'carrier' " (Section 1 First).

Nor can the provision requiring due notice to "the employee or employees and the carrier or carriers involved" be construed as requiring notice to employees individually as distinguished from notice to their statutory representatives any more than it can be construed as requiring notice to a carrier or carriers as distinguished from their representatives. The statute shows on its face that just as Congress considered and used the words representatives of a carrier as synonymous with the carrier, so Congress considered and used the word employees as synonymous with their statutory representative. Here again statutory usage conforms to collective bargaining practice in which the union *is* the employees. Thus, Section 2 First imposes a duty upon all "carriers, their officers, agents and *employees* to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes, whether arising out of such agreements or otherwise. . . ." Clearly the duty thus imposed upon "employees," to "make and maintain agreements" and "settle all disputes" is imposed not upon individual employees as such, but upon the statutory representative of the employees. Section 2 Second refers to "all disputes" which must be considered and decided by representatives of the carrier and the representatives of the employees "interested in the dispute," as existing between "a carrier or carriers and its or their employees. . . ." Section 2 Sixth, similarly refers to disputes arising out of grievances, concerning which the exclusive representative is under a duty to

confer with "the designated representative or representatives of such carrier or carriers," as disputes "between a carrier or carriers and its or their employees." This language, and mode of reference is repeated in Section 3 First (i), where, in the same context, the further obligations of the parties in cases arising out of grievances are set forth. The meaning of the words "employee or group of employees" as used in Section 3 First (i) is further illuminated by reference to Section 5. These two sections describe the disputes which are to be referred to the Adjustment Board and the Mediation Board, respectively. Both of them refer to disputes "between an employee or group of employees and a carrier," and both permit "either party" to such a dispute to invoke the services of the appropriate agency. This Court has noted that "disputes concerning the making of agreements" are within the jurisdiction of the Mediation Board (Slipsheet, p. 11), and that authority to negotiate concerning these disputes is vested solely in the representative (Slipsheet, p. 14). It is, therefore, clear that the employee party referred to in Section 5 is the representative, and not an individual employee. The parallel language of Section 3 First (i) must be given the same interpretation. The use of the term "employee or employees" in Section 3 First (j), consequently, far from having intrinsic significance or preserving rights to employees as distinguished from their statutory representative, simply comports with the use of the term "carrier or carriers" in that clause, and the obligations imposed upon the Adjustment Board, to the one as to the other, are fulfilled by giving due notice to the representatives of each (See Section 1, Sixth).

The suggestion advanced in the government's brief that the term "designated representative" which appears throughout the 1934 Act, and particularly in Section 2 Sixth, may not refer exclusively to the statutory representative selected by a majority of the craft or class pursuant to the terms of that Act (pp. 25-26) is simply absurd. The only way in which such an argument can be made is by ignoring the fact that in the 1934 Act Congress provided for majority rule and lodged power in the Mediation Board to determine, by means of an election or otherwise, the identity of the "designated repre-

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sentative." (Sec. 2 Ninth). The government's brief, consequently, attempts with a fair degree of success to ignore this crucial fact. The only reference to it in the government's brief appears in a footnote (p. 8, note 9), many pages before its discussion of this point. Even in that foonote, the Government attempts to convey the impression that somehow majority rule was made applicable by the statute only to the negotiation of major contracts; how, the Government never explains.

The construction of the statute urged in this brief is alone consistent with the objectives of Congress in the Act, and of labor organizations and employers in collective bargaining, when provision is made for arbitration as the final step in grievance adjustment. Arbitration machinery is utilized to resolve disputes between unions and employers, not between unions and their constituents.[105] And there is no basis whatsoever for assuming that Congress in providing for arbitration machinery within the "usual" framework of collective bargaining, intended to depart so drastically from customary practice as to create instead an agency in which the employer, facing the union on the one hand, and one or more employees on the other, is called upon to decide matters in issue between them. Yet such a result cannot be avoided if, as the Court's opinion declares, the employees interested in the dispute may bring a case to the Adjustment Board any time they are dissatisfied with the position taken by the union, and having brought the case, must be treated as parties to it. To sanction such a practice would be to invite employers to play off one group against another, thus destroying the entire fabric of collective bargaining and relegating the individuals and minority groups to a position in which they are once more at the mercy of the employer.

We submit that the proviso to Section 2 Fourth, like the proviso to Section 9 (a) of the National Labor Relations Act, points the way to according real protection to the interests of individuals and minority groups in the only manner and to the only extent compatible with the survival of collective bargaining. As appears from Mr. Doak's statement, occasionally

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[105] Lenhoff, Arthur, *The Present Status of Collective Contracts in the American Legal System* (May 1941), 39 Mich. L. Rev. 1109, 1124, 1134.

individuals or groups of employees are unsuccessful in obtaining the support of the union for some grievance which they may wish to present. By virtue of the proviso the union is, however, prevented from precluding presentation of the grievance directly to the employer. Thus, the employee, though unable to secure the aid of the majority representative in pressing his grievance, is free to attempt to persuade the employer of its merit. And, until the grievance is finally disposed of by agreement between the employer and the exclusive representative, the individual is free to continue to present his case before them. He is not free, however, to destroy collective bargaining by inviting the exercise of full judicial power by representatives of the employer without the concurrence of the exclusive representative in whom the other half of that power is vested.

IV. JUDICIAL AND ADMINISTRATIVE DECISIONS SUPPORT A CONSTRUCTION OF THE RAILWAY LABOR ACT WHICH EXCLUDES INDIVIDUAL BARGAINING RESPECTING GRIEVANCES

A. Administrative Decisions

Decisions of the National Labor Relations Board fully uphold the view of the employer-employee relationship and the interpretation of the two statutes set forth above. It has repeatedly held [106]

> that the execution of a collective contract does not end the process of collective bargaining, and that the interpretation and administration of a contract already made and the settlement of disputes arising under any such contract are properly regarded as within the sphere of collective bargaining.

It has recognized that [107]

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[106] *Matter of Consolidated Aircraft Corp.*, 47 N.L.R.B. 694, 706. Accord; *Matter of Rapid Roller Co.*, 33 N.L.R.B. 557, 589; *Matter of Carroll's Transfer Company*, 56 N.L.R.B. 935, 937-938; *Matter of Hughes Tool Co.*, 56 N.L.R.B. 981, 982; *Matter of U. S. Automatic Corp.*, 57 N.L.R.B. 124, 133; *Matter of The Alexander Milburn Co.*, 62 N.L.R.B., No. 67.

[107] *Matter of U. S. Automatic Corp.*, 57 N.L.R.B. 124, 134. Accord: *Matter of North American Aviation, Inc.*, 44 N.L.R.B. 604, 612.

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> Matters pertaining to the administration, interpretation, or modification of the collective agreement normally arise as grievances,

and that [108]

> The interpretation and application of the terms of a contract and the establishment of precedents involved in the adjustment of grievances are often as important, or more important, than the original collective bargaining which led to the signing of the contract.

Accordingly, it early held that [109]

> Section 7 guarantees employees the right to bargain collectively concerning grievances. . . . Therefore, any "interference" with the employees' rights to bargain collectively concerning grievances through their duly designated representative, . . . is proscribed by Section 8 (1) of the Act.

Consistently with these principles, the Board has condemned refusals by employers to bargain collectively concerning the disposition of grievances both before [110] and after [111] execution of written agreements and has also held that settling of grievances by contract with individuals is an unfair labor practice.[112] The grievances thus found to be within the scope of collective

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[108] *Matter of Hughes Tool Co.*, 56 N.L.R.B. 981, 982.

[109] *Matter of Cities Service Oil Co.*, 25 N.L.R.B. 36, 44. This case involved the refusal of three ship owners to grant passes to agents of the statutory representative to board their ships. The Board's holding that such passes should be granted rested on the necessity of allowing the union to investigate the facts as to "grievances" (25 N.L.R.B. at pp. 25 *et seq.*). The process of arriving at written contracts was not involved to any extent.

[110] *Matter of Rollway Bearing Co., Inc.*, 1 N.L.R.B. 651, 658-660; *Matter of The Boss Manufacturing Co.*, 3 N.L.R.B. 400, 411-412, 414; *Matter of American Hair and Felt Co.*, 19 N.L.R.B. 202, 209-214; *Matter of Hoosier Veneer Co.*, 21 N.L.R.B. 907, 930-931, 934; *Matter of Arundel Corp.*, 59 N.L.R.B. 505, 511; *Matter of Inter-City Advertising Co.*, 61 N.L.R.B. 1384; *Matter of Ross Gear and Tool Co.*, 63 N.L.R.B., No. 158.

[111] *Matter of Rapid Roller Co.*, 33 N.L.R.B. 557, 589; *Matter of Hughes Tool Co.*, 56 N.L.R.B. 981, 992; *Matter of U. S. Automatic Corp.*, 57 N.L.R.B. 124, 135; *Matter of The Alexander Milburn Co.*, 62 N.L.R.B., No. 67.

[112] The *Milburn; U. S. Automatic*, 57 N.L.R.B. at 132-136; *Hughes Tool*, 56 N.L.R.B. at 981, 984, 995; *Arundel*, 59 N.L.R.B. at 510-511; and *Inter-City* cases, *supra*, notes 108, 110 and 111.

bargaining have included such matters as discharges [113] and changes in work assignments."[114]

In *Matter of North American Aviation, Inc.*, 44 N.L.R.B. 604, the employer established, by unilateral announcement, a special procedure for employees who wished to present grievances "directly" to it, after a grievance procedure had been established for all the employees in a contract between the employer and the statutory representative. The Board held that the employer's action was illegal since, "Grievances and grievance procedure are normal and proper subjects of collective bargaining" (44 N.L.R.B., at p. 611). The order issued by the Board, however, was set aside by the Circuit Court of Appeals for the Ninth Circuit.[115] Thereafter, the Board's interpretation of the proviso to Section 9 (a) was clarified in an opinion issued by its General Counsel (13 L.R.R. 142-143) and adopted by the Board in its Eighth Annual Report (pp. 37-38, 67). This opinion incorporated views which, as the Board noted, were not presented to the Court in the *North American* case (Eighth Annual Report, p. 67).

The interpretation thus reached was incorporated in two decisions issued by the Board in 1944. *Matter of Hughes Tool Co.*, 56 N.L.R.B. 981; *Matter of U. S. Automatic Corp.*, 57 N.L.R.B. 124. In the *Hughes Tool* case, the Board held that prior to execution of a contract the adjustment of a grievance constitutes "bargaining respecting a condition of employment," that after execution of a contract, such an adjustment constitutes either an interpretation or application of the contract or, if the subject matter is not dealt with in the contract, bargaining respecting a condition of employment, and that the right to negotiate concerning such matters is "vested exclusively in the statutory representative." It interpreted the proviso to Section 9 (a) as permitting individual employees to present grievances "by appearing in behalf of themselves . . . at every stage of the grievance procedure, but that the exclusive representative is entitled to be present and negotiate at

[113] See the *Rollway, Boss Manufacturing, Hoosier Veneer*, and *Alexander Milburn* cases, *supra*, notes 110 and 111.

[114] See the *Inter-City* case, *supra*, note 110.

[115] *National Labor Relations Board* v. *North American Aviation Co.*, 136 F. 2d 898. This decision is discussed below, p. 74, note 118.

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each such stage concerning the disposition to be made of the grievance." Where the exclusive representative declines to participate in the disposition of the grievance, the employer may meet with the employees alone and adjust it (56 N.L.R.B., at pp. 982-983). In reaffirming this interpretation, which, as the Board noted, gives the proviso "its literal meaning," and therefore comports with the rule that provisos to remedial legislation are to be strictly construed so as to further the broad purposes of the legislation, the Board said:

> The extension by employers to individuals or groups of employees of greater rights than these, would undermine the kind of collective bargaining which the Act seeks to encourage."[116]

This interpretation of the proviso to Section 9 (a) by the National Labor Relations Board has been followed by the National War Labor Board. In *Re Douglas Aircraft Co., Inc.*, 25 War Labor Rept. 57, 16 L.R.R. 585, that Board said:

> It is true that the union settlement of a grievance presented directly by an employee may not be as advantageous to him as he would want or even as he might be able to obtain. But provided only the union has not acted in bad faith such a result is an integral part of any system of majority rule and is no justification for subverting the collective bargaining process."[117]

B. Judicial Decisions

This view of the employer-employee relationship, incorporated in decisions of the Federal administrative agencies, is also supported by judicial authority. In fact, we believe that it is required by the leading decisions of this Court.

Judicial recognition has been given to the fact that the establishment of working conditions in industry is a governmental process. In *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. 2d 632, 638, the Fourth Circuit noted not only that the execution of written agreements was

[116] *Matter of U. S. Automatic*, 57 N.L.R.B. 124, at p. 135.

[117] 25 War Labor Rept., at p. 62, 16 L.R.R., at p. 586. Accord: *In re John Morrell & Co.*, 21 War Labor Rept. 730, 735, 742, 15 L.R.R. 871; *In re McLouth Steel Corp.*, 27 War Labor Rept. 514, 515, 517, 518, 521, 17 L.R.R. 252, 253-254; Cf. *In re Western Electric Co., Inc.*, 24 War Labor Rept. 525, 533-534, 16 L.R.R. 493, 494.

the legislative aspect of that process, but also that the substitution of this process for direct negotiations between employer and employee meant elimination of autocratic rule:

> The purpose of the written trade agreement is, not *primarily* to reduce to writing settlements of past differences, but to provide *a statement of principles and rules for the orderly government of the employer-employee relationship* in the future. The trade agreement thus becomes, as it were, the industrial constitution of the enterprise, setting forth the broad general principles upon *which the relationship of employer and employee is to be conducted.* Wages may be fixed by such agreements and specific matters may be provided for; but the thing of importance is that the agreement sets up a modus vivendi, under which employer and employee are to carry on. It may be drawn so as to be binding only so long as both parties give their assent to it; but the mere fact that it provides a framework *within which the process of collective bargaining may be carried on* is of incalculable value in removing the causes of industrial strife. If reason and not force is to have sway in industrial relationships, such agreements should be welcomed by capital as well as labor. They not only provide standards by which industrial disputes may be adjusted, but they add dignity to the position of labor and remove the feeling on the part of the worker that he is a mere pawn in industry *subject to the arbitrary power of the employer.* (Italics added.)

In *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, this Court placed restraints on the power of a representative under the Railway Labor Act to negotiate contracts precisely because that power is "not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates" (323 U. S. at p. 198). It held:

> We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . but it also im-

> posed on the representative a corresponding duty (323 U. S. at p. 202).

This Court has recognized also that collective bargaining is a continuous process which includes interpretation of the legislative agreement:

> . . . the Act imposes upon the employer the further obligation to meet and bargain with his employees' representatives respecting proposed changes of an existing contract and also to discuss with them its true interpretation, if there is any doubt as to its meaning.

National Labor Relations Board v. *Sands Manufacturing Co.*, 306 U. S. 332, 342. Accord: *Rapid Roller Co.* v. *National Labor Relations Board*, 126 F. 2d 452, 459 (C.C.A. 7), cert. denied 317 U. S. 650. Accordingly, it has been held that it may be necessary "to bargain collectively . . . for the adjustment of complaints or alleged violations of . . . an agreement." *Newark Morning Ledger Co.* v. *National Labor Relations Board*, 120 F. 2d 266, 267 (C.C.A. 3), cert. denied 314 U. S. 693. The Court there said:

> Collective bargaining is thus seen to be a continuing and developing process by which, as the law now recognizes, the relationship between employer and employee is to be molded and the terms and conditions of employment progressively modified along lines which are mutually satisfactory to all concerned.

In upholding and enforcing the order of the Board in *Matter of Cities Service Oil Co., supra*, the Court of Appeals for the Second Circuit said (*National Labor Relations Board* v. *Cities Service Oil Co.*, 122 F. 2d 149, 151), "The result of refusing passes [to bargaining representatives to handle grievances] is undoubtedly to prevent the most effective sort of collective action by the employees." It expressly noted, in this connection, the importance of having grievances handled by experienced representatives, rather than by those who are "continually under the eye of the master." (122 F. 2d, at p. 151). In *National Labor Relations Board* v. *Bachelder*, 120 F. 2d 574 (C.C.A. 7), the Court upheld a Board finding that the employer had illegally failed to bargain collectively about certain

discharges which the union held to have been discriminatory. In doing so, it rejected the employer's contention that:

> That is not a part of negotiation. Negotiation contemplates an agreement for future activities but does not contemplate a settlement of past grievances. It involves future relationships for employer and employees. It is toward the future and not toward the past. They are two distinct and separate situations and the law recognizes them (120 F. 2d, at p. 577).

When the Board's order in the *Hughes Tool* case, *supra*, came before the Circuit Court of Appeals for the Fifth Circuit, it was enforced with only one modification material here, although in its opinion the Court appeared to reject the contentions of the Board in several respects. *Hughes Tool Co.* v. *National Labor Relations Board*, 147 F. 2d 69.[138] Thus the Court held that the National Labor Relations Act distinguishes between collective bargaining, which it viewed as fixing rules of employment for the future, and the disposition of grievances. It stated that some grievances may involve facts "peculiar to the employee, not affecting the unit" (147 F. 2d, at pp. 72-73). At the same time it recognized that grievances

> may raise a question of the meaning of the contract, or present a situation not covered by the contract touching which an agreement ought to be made. In the latter case it is plain that the representative ought to participate, for bargaining, rather than a mere decision of a case according to the contract is involved. Attention to grievances is therefore mentioned in Section 2 (5) as part of the business of the representative, but Section 9 (a) does not give him the *exclusive* right to handle them unless they

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[138] As noted above (p. 70), an earlier decision of the Board holding that the proviso to Section 9 (a) did not permit an employer to set up a separate grievance procedure in addition to that established by the collective contract, was set aside by the Circuit Court of Appeals for the Ninth Circuit in an opinion which held that the proviso permitted the employer to take up and dispose of grievances presented by individuals, and that hence, it was permissible to have such a dual grievance procedure under which matters involving interpretations of the collective contract could be determined without reference to the exclusive bargaining representative. *National Labor Relations Board* v. *North American Aviation Co.*, 136 F. 2d. 898. We submit that this decision was clearly erroneous.

> really involve a bargaining for the unit, or an interpretation of the bargain (*id.* at p. 73).

Thus the Court clearly recognized that the representative alone has a right to participate in the disposition of those grievances which "involve a bargaining for the unit" and that that right is an aspect of its statutory right to bargain collectively. The decree which the Court ultimately entered required the employer to notify the representative of each grievance presented to it to enable the representative to advise the employer whether it considered that it had an interest in disposition of the grievance, and to bargain collectively concerning disposition of the grievance unless it involved "some question of fact or conduct peculiar to the employee . . . and not involving an interpretation of a collective agreement or a matter properly the subject of a collective agreement." [19]

The part which the adjustment of grievances necessarily plays in the collective bargaining process makes directly applicable here those decisions of this Court which rejected the theory that individual bargaining could co-exist with collective bargaining under either the Railway Labor Act or the National Labor Relations Act. *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U. S. 342, and *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332. In the latter case, this Court held that:

> The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group (321 U. S. 338).

Accordingly, it held that the institution of collective bargaining puts an end to the use of individual contracts with the employees. In the *O.R.T.* case, the Court overruled the employer's contention that individual contracts made after the collective contract superseded the latter, saying:

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[19] The National Labor Relations Board, on the authority of *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U.S. 342, 346-347, quoted below (p. 76), urged the Court that there was no room for the exception thus made and that all grievances came within the authority of the bargaining representative. Whether it was correct in that position need not be decided here since the grievance involved in the instant case was clearly a matter affecting the craft as a whole.

> If this were true, statutes requiring collective bargaining would have little substance, for what was made collectively could be promptly unmade individually.

Turning to the employer's further contention that the particular situation which the employer and the employees had dealt with by separate agreement was "unique," this Court pointed out that (321 U. S. at pp. 346-347):

> . . . exceptional situations often have an importance to the whole because they introduce competitions and discriminations that are upsetting to the entire structure. Hence effective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions. . . . But the Company did not observe the right of the representatives of the whole to be notified and dealt with concerning a matter which from an employee's point of view may not be exceptional or which may provide a leverage for taking away other advantages of the collective contract.[10]

Since the instant case involves principally the question whether individual employees may attempt to secure a better settlement of grievances than the collective representative is able or willing to secure for them, it is of the greatest importance to note that in the *J. I. Case* and the *O.R.T.* cases this Court ruled out not only those individual contracts which lower the collective standard but also those which secure "better terms than those obtainable by the group" (321 U. S., at p. 338):

> The practice and philosophy of collective bargaining looks with suspicion on such individual advantages . . . advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice or representatives; increased compensation, if individually deserved, is

[10] The claim dealt with in the *O.R.T.* case was in fact a grievance, in that it rested on a failure to apply the terms of a collective contract. It came before and was decided by the National Railroad Adjustment Board, the agency established by the Railway Labor Act to dispose of disputes involving the "application of agreements." Yet it was handled throughout by the emloyees' representative without participation, for ought that appears, of the employees directly involved.

> often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole (321 U. S. at pp. 338-339).

In reaching these conclusions, the Court clearly indicated the extent of and limitations upon the rights of individual employees. It noted that every employee in the unit receives the advantages of the "strength and bargaining power . . . of the group" (321 U. S., at p. 338). It noted further that each individual employee has a voice in determining the representation, if any, of the group, but that this right is subject to the qualification necessary wherever "the majority rules;" that "if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective results" (321 U. S., at p. 339). Finally, this Court has held that each employee is entitled to the same protection against arbitrary discrimination that citizens enjoy in democratic government. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 198, 202.

We submit that these cases show that the exclusive bargaining representative has the right to participate in the disposition of grievances, that that right is an aspect of its exclusive statutory power to "bargain collectively" on behalf of the employees, and that hence the words of this Court in the *Steele* case, *supra*, that, where a representative has been selected, members of the craft "cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining" (323 U. S., at p. 200) are fully applicable here. In the words of the Circuit Court of Appeals for the Sixth Circuit, collectivization of the employment bargain requires each employee "to surrender to a collective agent his individual right to bargain with an employer."[28] We believe that this was the burden of the decision of this Court in *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678; that is, that the employer should refrain from operative dealings with any but the duly chosen employee repre-

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[28] *National Labor Relations Board* v. *Knoxville Publishing Co.*, 124 F. 2d 875, 881 (C.C.A. 6).

sentative respecting terms and conditions of employment. The Court there said (at p. 686):

> Bargaining carried on by the employer directly with the employees, whether a minority or a majority . . . would be subversive of the mode of collective bargaining which the statute has ordained . . . (321 U. S., at p. 684). . . . orderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees themselves . . . (*id.*, at p. 685). [It was the employer's statutory duty to refuse] to negotiate with anyone other than the duly designated bargaining representatives of his employees.

These decisions the government in its brief now in effect asks this Court to overrule. For the government admits (pp. 20-21, 32-33) that the only time the individual will wish to represent himself in adjusting a grievance is when he thinks he can get more from the employer than the collective representative is willing or able to get for him. To permit him to do so will once again open the door to employer exploitation of competition among employees. We had thought that it was too late in the day to suggest that the door which had been shut by Congress in the Railway Labor Act and the National Labor Relations Act and locked by this Court in the *J. I. Case, O. R. T.* and *Medo* cases, should now be blasted open.

CONCLUSION

In executing the settlement agreement of October 28, 1938, the Brotherhood was acting in its capacity of statutory representative, in which capacity it possessed exclusive power to contract with petitioner for the settlement of grievances. The settlement so executed is therefore valid and binding upon the complaining employees. In its capacity as party to the contract with petitioner dated April 1, 1927 (*supra*, p. 4), and as statutory representative, the Brotherhood was empowered to submit the grievance upon which the complaint herein is based to the Adjustment Board, and thereby to confer jurisdiction upon the Adjustment Board to issue a binding

decision on the question. Since the individual complaining employees could not lawfully contract with the employer for the settlement of the claim, and since the Brotherhood had full power to represent them in the proceedings before the Adjustment Board, their failure to participate as parties in the settlement agreement and in the proceedings before the Adjustment Board cannot detract from the binding nature of the settlement agreement and the Adjustment Board's decision. We respectfully submit, therefore, that the decision of the Circuit Court of Appeals should be reversed with directions to affirm the judgment of the District Court.

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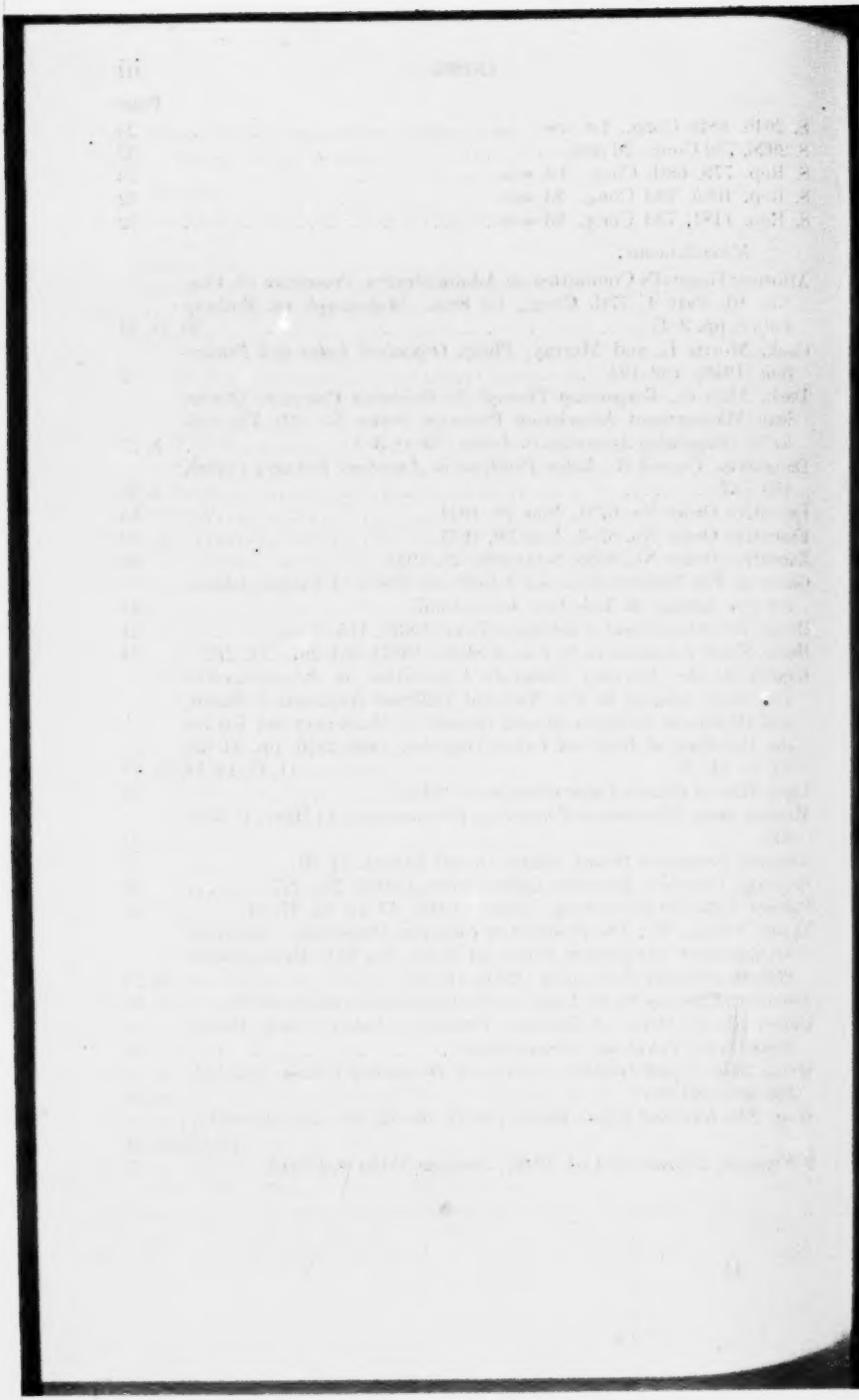

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 160

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,
Petitioner,

v.

G. W. BURLEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE ON REARGUMENT

The Court has invited the Solicitor General to submit a brief and participate in the reargument of this case.

Inasmuch as the facts are adequately set forth in the Court's opinion at the last Term, it seems unnecessary to restate them here. Relevant provisions of the 1920, 1926 and 1934 railway labor legislation are set forth in Appendix A. *infra*, pp. 37-45.

Introductory Statement

The original opinion holds (1) that in the absence of proof of authority from each individual employee involved which would be sufficient under the law of agency, the representative chosen by the majority of the bargaining unit has no power to settle grievance cases related to accrued claims in negotiation with the carrier or to institute proceedings before the National Railroad Adjustment Board on behalf of the employees, and (2) that in the present state of the record the Court could not say that the employees had granted the Brotherhood such authority, either expressly or by reason of their belonging to the Brotherhood.

We had been of the opinion that, at least in so far as members of the Brotherhood were concerned, there could be no question as to the authority of the organization to represent them in handling grievances even under the principles of agency. Inasmuch as this case only involved Brotherhood members, we had not thought that the broader question would be reached and hence had not sought to present our views. But the significant question decided by the Court is that a labor organization may not settle grievances for its members in the absence of express authorization, an issue which is relevant only on the assumption that the General Rules of the Brotherhood do not contain any such authority. Since it is the decision on this point which has unsettled the normal processes of grievance adjustment and which has prompted us to suggest a reconsideration of the case, we shall address our discussion to that proposition.

The facts of this case present questions as to whether and under what circumstances a labor organization representing a craft has any authority (1) to settle grievance claims with the carrier, and (2) to submit such claims to the Adjustment Board. Here the Adjustment Board award

rested on the prior settlement, so that the validity of the settlement may be regarded as underlying the entire case. In any event, we think the Court properly deemed the authority of the representative in the two situations governed by the same principles (Op., p. 14). Inasmuch as the great majority of cases are disposed of on the properties by agreement, the impact of the decision on settlements through negotiations between carriers and representatives is probably of greater significance than its effect on the operations of the Adjustment Board.

It is also to be noted that this case involves members of the labor organization representing the bargaining unit. It has not hitherto been suggested that this made any difference, apart from the relationship between union membership and the existence of agency authority, and we are not inclined to suggest that any line ought to be drawn between members and non-members of the union. But some of the material to which we shall refer appears to differentiate between the authority of the union to represent members and non-members in handling grievances and more clearly supports the right of the union to represent members than non-members. For purposes of this case it is unnecessary, of course, to determine the rights of employees who are not members of the organization which has acted as their representative.

It is often and properly said that the disposition of grievances is an essential and important part of the collective bargaining process.[1] Amicable relationships between em-

[1] Twentieth Century Fund, *Labor and the Government* (1935), 46-49; Carroll R. Daugherty, *Labor Problems in American Industry* (1938), 450-453; Webb, Sidney and Beatrice, *Industrial Democracy* (1920), 234-237; George W. Taylor, *The Function of Collective Bargaining* (American Management Association, Personnel Series No. 81), *Management's Stake in Collective Bargaining* (1944), 11-13; Allen G. Dash, *Bargaining Through the Grievance Procedure* (American Management Association Personnel Series No. 82), *The Collective Bargaining Agreement in Action* (1944), 3-5; Morris L. Cook and Philip Murray, *Organized Labor and Production* (1940), 192-193.

ployers and employees are dependent upon the fair settlement of the large number of relatively minor cases involving the interpretation and application of contracts and other grievances as well as upon the terms of the underlying contracts. Since the disparity of bargaining power between the individual employee and the employer is as marked in settling grievances as in negotiating contracts, the employees customarily handle their grievances collectively through labor organizations. When they do they are bargaining collectively in a true sense.[2]

This does not mean, however, that the disposition of grievances must be treated in all respects identically with the negotiation of contracts. It seems clear that as to certain types of grievance cases the interest of the individual is much greater, in contrast with that of the entire bargaining unit, than in the formulation of the general contract. A great deal has been said on both sides as to whether the difference is great enough to warrant a differentiation in treatment under the law; in particular, arguments of policy have been presented as to whether the exclusive right of the representative designated by the majority of the craft should or should not extend to grievances as well as to negotiating contracts.[3] Constitutional questions aside, the issue, however, seems clearly to be one of policy for Congress to decide, and we assume that no one would deny that Congress could exclude that portion of collective bargaining relating to grievance handling from the principle of exclusive majority rule. It also cannot be denied that in the Railway Labor Act Congress has established a separate

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[2] It follows that if the employer refuses to treat with the designated union on grievances he is refusing to bargain collectively. *Rapid Roller Co.* v. *National Labor Relations Board*, 126 F. 2d 452, 457-9 (C. C. A. 7), certiorari denied, 317 U. S. 650.

[3] See the briefs filed on behalf of the Railway Labor Executive Association and the C. I. O. as *amici curiae*.

machinery for grievance cases. The first question reached in this case is whether these special provisions mean that the collective representative has no exclusive right under the statute to settle grievance cases for members of the craft or class.

I

THE NON-EXCLUSIVE NATURE OF THE LABOR ORGANIZATION'S RIGHT TO HANDLE GRIEVANCES

Although a number of theories have been advanced as to the precise relationship under the Act of the individual and the collective representative in the disposition of grievances, there is a substantial area in which there can be little basis for disagreement. We agree with the Court, petitioner and respondent, that the individual employee has the right to present grievances either to his employer or to the Adjustment Board, a right which allows him at least to argue the merits of his case.[4] There is also substantial agreement that the collective representative must be consulted—or at least notified[5]—whenever a grievance case involves an interpretation of the collective agreement or an application which may be of interest to the bargaining unit as a whole. Although the Court's opinion leaves the question open, it seems to recognize (Op., pp. 20–21) that there may be an important collective interest in many such cases. The effectuation of the collective representative's right to act on behalf of the craft in bargaining in the strict sense requires that it have a voice in the disposition of such matters.

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[4] This is admitted in the *amicus* brief for the the C. I. O. (p. 20), though not in the *amicus* brief for the Railway Labor Executives Association (see pp. 19, 27).

[5] *Hughes Tool Co.* v. *National Labor Relations Board*, 147 F. 2d 69 (C. C. A. 5).

There may be cases in which the collective interest is too slight to warrant participation by the representative. Whether or not a case is of that character would seem to be a matter for the collective representative itself to decide. But clearly, as this Court recognized (Op., p. 20), this is not such a case, and we are not here called upon to consider how other types of cases should be handled or to decide where, if anywhere, a dividing line between cases of collective and of purely individual interest should be drawn.

The Court's opinion (Op., p. 19) properly narrows the issue to the determination of the capacity in which the individual and the representative participate in the procedure—whether the right of each is merely to be heard or is to participate in the disposition of the grievance. We think that where the case involves a question as to the interpretation of the collective agreement, as here, even as to a past claim, the representative must have a right to do more than merely present his views. For the agreement is the product of the negotiation between the carrier and the representative and the construction they put upon it should be controlling.[6] In this case, however, it is not necessary to determine whether the representative is a necessary party to the settlement, but whether and in what circumstances the employee is.

Although petitioner does not contend that the individual's right is only to be heard and not to participate in the final determination of the grievance, that position is taken by other *amici curiae*. The Court has rejected this sug-

[6] This is well understood in the industry, so that there is no problem when the employer and the representative agree upon an interpretation even if an individual employee or a minority should be of a different view. There is also no difficulty as to the employees' position in an interpretation case where the individual interprets the agreement in exactly the same way as the majority representative, as is true here; the question as to whether in such circumstances the case shall be compromised on a particular financial basis is not one of interpretation of the underlying agreement.

gestion, and we believe correctly. Although most grievance cases were handled by the collective representative, the usual practice (cf. Section 3, First (i)) on the railroads prior to 1934 permitted individuals and minority organizations both to present and to settle grievance claims, always subject to the reservation that the "recognized interpretation" of the agreement by the carrier and the collective representative was controlling.[7] The decision of the Railroad Labor Board, which first clearly enunciated the majority rule principle, provided that (Decision No. 119, 2 Railroad Labor Board 87, 96):

> 15. The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice.

The phrase "to present grievances" was not regarded as limiting the individual employee or the minority "not members of the organization representing the majority" to the submission of the case to the management and the collective representative jointly. On the contrary, except for the reservation previously noted, the collective representative apparently took no part in the proceedings.

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[7] As to the practice of minority representation among the train service brotherhoods, see p. 19 *infra*, and the Transcript of Record in *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338. The evidence in that case was accurately summarized in the findings of fact of the district court (R. 48-50) to the effect that the "usual manner of handling" included the "presentation and handling to conclusion" of a claim by the individual or organization to which he belonged, irrespective of whether it was the collective representative. The pertinent findings are set forth in the Appendix (*infra*, pp. 45-47).

That an individual or minority group was to have a voice in the disposition of the cases and not merely a right to be heard is confirmed by the statements of Coordinator Eastman and Mr. Harrison, who explained the 1934 bill to the Congressional committees,[8] as well as by the explanation of the 1926 Act, which contained substantially identical provisions relating to this aspect of grievance procedure, by Mr. Richberg.[9] The National Mediation Board on three occasions and an emergency board have recognized that the collective representative does not have the exclusive right to handle grievances.[10] These statements by those who explained the Act to Congress and who subsequently administered it are, of course, highly persuasive. And in the one prior judicial proceeding in which the point was raised (*General Committee* v. *Southern Pacific Co.*, 122 F. 2d 194 (C. C. A. 9), reversed on jurisdictional grounds, 320 U. S. 338), the circuit court of appeals held that the craft representative had no exclusive right in grievance cases. Neither these authorities nor the other related contemporaneous statements under the National Industrial Recovery Act (48 Stat. 195) and Public Resolution No. 44 (48 Stat. 1183) contain any intimation that the employee was to "present" grievances to anyone but the employer or that the right to present did not include the power to dispose of, settle or adjust.[11]

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[8] See Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7650, 73d Cong., 2d sess., pp. 44, 83, 89.

[9] See Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7180, 69th Cong., 1st sess., pp. 42, 67, 81-84; Hearings before Senate Committee on Interstate Commerce on S. 2306, 69th Cong., 1st sess., pp. 125-126. The 1934 Act altered the 1926 scheme by providing for exclusive majority rule in the negotiation of contracts, but the pertinent provisions relating to grievances remained unchanged. See pp. 15-17, *infra*.

[10] We have set forth in the Appendix, *infra*, pp. 45, 47-51, excerpts from the opinion and rulings of these boards, all but one of which appear in full in the Transcript of Record in *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338. See also fn. 2, at 320 U. S. 342-343.

[11] This material is summarized in the Appendix, *infra*, pp. 51-53.

Although for these reasons we agree with the Court's premise that the collective representative does not have an exclusive right to adjust grievances even for the members of the bargaining unit, we do not think that it necessarily follows that the majority organization may only represent persons from whom it has obtained agency authority. The underlying reason for recognizing the individual's right is to enable him to protect himself when he believes that the organization will not adequately represent him. In the light of the problems presented in *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, and *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, and of the practice of the Adjustment Board and of some of the organizations with respect to individuals' claims, we share the Court's solicitude as to the rights of individuals in grievance cases.[12] Those rights may be adequately protected, in our opinion, without destroying the established methods for the handling of grievances. The *Steele* and *Moore* cases in themselves provide the individual with substantial protection. The former imposes on the collective representative a duty to act in good faith and without discrimination on behalf of all members of the bargaining unit; any disposition of a grievance in disregard of that principle would be unlawful and obviously not binding. The *Moore* case upholds the right of an individual to maintain an action in court on a grievance instead of submitting it to the Adjustment Board. In addition, we think it recognizes by necessary implication what the Court has now held, that the individual has the right to present a grievance and adjust it with the carrier individually or through any representative he chooses, and that he has the

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[12] See the briefs for the United States as *amicus curiae* in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338, and *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192.

same alternative in submitting cases to the Adjustment Board.[13]

As long as the individual has the right and power to avail himself of these means whenever he wishes, we believe that he is adequately safeguarded. But in the vast majority of cases the individual not only has no desire to represent himself, but his bargaining power is greatly enhanced when he is represented by the organization. It is thus to the great advantage of the employees individually that no obstacles be placed in the way of the handling of grievances through the collective representative.

II

THE PRACTICE OF HANDLING GRIEVANCES WITHOUT ANY AFFIRMATIVE SHOWING OF AGENCY AUTHORITY

Before the 1934 amendatory act was passed, the customary practice on the railroads was for grievance cases to be handled by the labor organization without the necessity for showing special authorization from each employee,[14] although the right of the individual to handle his own case if he wished was not denied. The organizations normally only submitted the grievances of their members, but on occasion they represented non-members as well. In all such cases, unless put on notice to the contrary, the carrier assumed, or presumed, that the organization had the necessary authority, and disputes were settled, on the property and by the adjustment boards, on that basis.

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[13] As the Court knows, the Adjustment Board has not recognized the individual's right to appear except through an organization, although it has recognized the right of employees to appear through organizations represented on the Board which do not represent the majority of a craft or class.

[14] Although this brief is concerned only with the railroad industry and railroad legislation, we understand that the practice in other industries as to authorization is the same. See references cited in note 32, *infra*, p. 24.

We think it clear that the 1934 amendment was not meant to require departure from the prior practice in handling grievances, and that although, both before and since 1934, individuals possessed the right to adjust their own grievances when they wished, in the absence of any manifestation of desire by an individual to exercise that right Congress intended that the carrier negotiate with the collective representative as before.

The prior practice will appear from an outline of the history of the machinery for adjustment of grievances. That Congress did not intend to change the practice will appear from an examination of the Act itself, its history and objectives.

The first predecessor to the present Adjustment Board was established by the Director General of Railroads in 1918. Three identical agreements between the labor organization and Regional Directors of the Railroad Administration established national adjustment boards, composed of equal representatives of labor and of management.[15] These agreements are sufficiently important to warrant quoting two of their provisions in full:

> 10. Personal grievances or controversies arising under interpretation of wage agreements, and all other

[15] The material referred to in this portion of the brief is taken from a compilation of material on the Adjustment Board entitled "Inquiry of the Attorney General's Committee on Administrative Procedure relating to the National Railroad Adjustment Board, and Historical Background and Growth of Machinery Set Up for the Handling of Railroad Labor Disputes, 1888-1940". This volume (hereinafter cited as "Compilation") is a compilation of most of the pertinent documentary material relating to the National Railroad Adjustment Board. It contains in full the reports of and proceedings before the Attorney General's Committee on Administrative Procedure dealing with the Adjustment Board, and reprints the executive orders, collective labor agreements, and statutes disclosing the history of the Adjustment Board and also the leading speeches and articles describing its operation. This publication was compiled by Harry E. Jones, Executive Secretary, Eastern Committee for the National Railroad Adjustment Board, New York City. Most of the documents hereinafter referred to are printed in the Appendix to the volume (the separately numbered *pink* pages).

disputes arising between officials of a railroad and its employees, covered by this understanding, *will be handled in their usual manner* by general committees of the employees up to and including the chief operating officer of the railroad (or some one officially designated by him), when, if an agreement is not reached, *the chairman of the general committee of employees* may refer the matter to the chief executive officer of the organization concerned, and if the contention of the employees' committee is approved by such executive officer, the chief operating officer of the railroad and the chief executive officer of the organization concerned shall refer the matter, with all supporting papers, to the Director of the Division of Labor of the United States Railroad Administration, who will in turn present the case to the Railway Board of Adjustment No. 1, which board shall promptly hear and decide the case, *giving due notice* to the chief operating officer of the railroad interested and *to the chief executive officer of the organization concerned of the time set for hearing.*

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12. In hearings before the Railway Board of Adjustment No. 1, in matters properly submitted for its consideration, the railroad shall be represented by such person or persons as may be designated by the chief operating officer, and the employees shall be represented by such person or persons as may be *designated by the chief executive officer of the organization concerned.*[16] [Italics supplied.]

The above sections show that both on the property and before the adjustment boards the employees' contentions in grievance cases were made only by and through the union committees and officers. Paragraph 10 also contains the expression, which has survived up through the present Act, that the grievances are to be "handled in their usual manner"; the modifying phrase "by general com-

[16] Compilation, *supra*, p. 21.

mittees of the employees''—which is not found in the present law—would appear to be descriptive of the prior manner of handling by union members as well as mandatory.

As has been noted, the agreements were signed on behalf of the employees by the heads of the railway labor organizations. In the absence of any legal requirement for majority rule, these officials could only act for their members. The agreements on their face seem only adapted to handling the cases of union members, and this seems to have been the understanding.[17] As a consequence the Director General established by order a procedure for the disposition of grievances of ''employees not represented by Railway Boards of Adjustment.'' Such cases were to be ''handled in the usual manner by the individual, his representative, or by committees of employees,'' and if an agreement was not reached by the carrier, submitted to members of the staff of the Director General who rendered the same service as boards of adjustment.[18]

Title III of the Transportation Act of 1920 (41 Stat. 456) sought to reestablish the Boards of Adjustment, which had disappeared with the expiration of the Railroad Administration. Section 302 of the Act declared that Boards of Adjustment ''may be established by agreement.'' Section 303 provided that such boards should hear and decide grievances ''upon the application of the chief executive of any carrier or organization of employees'' and ''upon the written petition signed by not less than 100 unorganized employees.'' Section 307 contained identical requirements as to applications by the chief executive of the organization and by one hundred unorganized employees for the submission both of grievances not settled by an adjustment board and of other disputes to the Railroad Labor Board.

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[17] See Wolf, *The Railroad Labor Board* (1927), pp. 52, 53.

[18] See Compilation, *supra*, pp. 31-32.

These provisions show that it was contemplated that union members were to be represented in all cases, including grievances, by the union officials. This understanding is confirmed by the Railroad Labor Board's statement of principle (*supra*, p. 7) which preserved only the rights of non-members to present grievances individually. We do not read the restriction of the right to invoke the Board's services to one hundred unorganized employees as depriving a smaller number of individuals of all rights to safeguard their own interests. The Act was only concerned with disputes on a scale large enough to interrupt commerce, and the individual undoubtedly retained other remedies available, either by way of individual adjustment with the carrier or in court.

The precatory adjustment provisions of the 1920 Act were quite ineffective; few adjustment boards were established. Regional boards were created, however, for the train service employees in three sections of the country. Paragraph 8 of these agreements was almost identical with Paragraph 10 of the 1918 adjustment agreements. It provided for the handling of "disputes arising between a railroad and its employees covered by this agreement • • • in their usual manner by general committees" and for reference of the case by the chief executive of the organization, if he approved the employee's contention, to the board.[19] In deference to the 1920 statute these agreements also permitted petitions "by not less than one hundred unorganized employees of the classes covered by this agreement."[20] Presumably because of this additional feature, instead of the 1918 provision for representation only by the persons designated by the chief executive or officers of the organization, Paragraph 10 of the 1920 contracts

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[19] See Compilation, *supra*, pp. 40, 44, 51.
[20] *Ibid.*

permitted employees to "be represented by such person or persons as may be designated by them."[20] The agreements also conditioned the right of 100 unorganized employees to file a case by a proviso, that "no dispute over an interpretation of an existing agreement, rule or practice which has been agreed to or accepted by the management and the duly constituted committee representing the employees, parties thereto, shall be considered as a dispute under this agreement."[20] This proviso indicates that unorganized employees were not to be permitted to override an interpretation of the agreement between the carrier and the organization acting for the craft. It also strongly implies that in other respects unorganized employees could represent themselves if they so desired. But here too it was clearly understood that the organized employees would be represented by the organization, which alone could submit their cases to the Board, without any suggestion that further special authorization was at all essential.

The failure of the carriers and the organization to establish adjustment boards between 1920 and 1926 resulted in the Railroad Labor Board's being swamped with grievance cases.[21] The Railway Labor Act of 1926 (44 Stat. 577) sought to cure this difficulty in the 1920 law by appearing to make the establishment of adjustment boards mandatory. Section 3 of the Act provided that:

> "Boards of adjustment *shall* be created by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employees. [Italics supplied.]

Section 3 then required that the agreements for the establishments of adjustment boards:

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[20] *Ibid.*

[21] Wolf, *The Railroad Labor Board* (1927), p. 371; Hearings before the Senate Committee on Interstate Commerce on S. 2646, 68th Cong., 1st sess., p. 4 (testimony of D. B. Robertson).

(c) Shall provide that disputes between an employee or group of employees and a carrier, growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, that the dispute shall be referred to the designated adjustment board by the parties, or by either party, with a full statement of the facts and all supporting data bearing upon the dispute;

(d) Shall provide that the parties may be heard either in person, by counsel, or by other representative, as they may respectively elect * * *. Adjustment boards shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in the dispute;

These provisions, it should first be noted, are substantially identical with Section 3, First (i) and (j) of the 1934 law governing proceedings before the present Adjustment Board.[22] The major change from the equivalent paragraphs of the 1920 Act and the agreements under it was the elimination of the differentiation between organized and unorganized employees. The former were no longer expressly required to act through the committees or officials of the organization, nor were the latter permitted only to proceed in groups of at least one hundred. The reaffirmation that disputes were to be "handled in the usual manner" refutes, however, any notion that other changes in the method of dealing with grievances were proposed.

That the boards under the new Act were to be of the same type as their predecessors was clearly indicated. In explaining the 1926 Bill to the House Committee, on behalf

[22] None of the slight verbal differences between the 1926 and 1934 paragraphs is of consequence here.

of both the labor organizations and the carriers, Mr. Donald Richberg stated: "Of course, these boards of adjustment * * * are quite well understood as a term, we will say, in railroad operation—that is, the board of adjustment is a well understood thing."[23] Representative Cooper, a member of the House Committee, in explaining the bill on the floor stated (67 Cong. Rec. 4505): "This is not a new procedure. For years it has been the custom of many railroads and of their employees to adjust disputes that might arise from time to time by boards of adjustment, members of which understood the problems by reason of their technical knowledge of industry." In addition, Senator Watson, who introduced the bill, and Representative Barkley, who explained it to the House, praised the 1918 adjustment boards and indicated that the adjustment provisions of the Railway Labor Act were modeled on them. 67 Cong. Rec. 4510-4511, 4517, 8808.

The 1926 Act also contained, in Paragraph First, Second and Fourth of Section 2, the identical provisions now found in Paragraphs First, Second and Sixth of Section 2 of the present law. Paragraph Fourth (now Sixth) declared that in grievance cases

> it shall be the duty of the designated representative or representatives of such carrier and of such employes, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held.

This reference to "designated representative", as contrasted with "employees or groups of employees", "the parties or either party", and "any person, by counsel

[23] Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7180, 69th Cong., 1st sess., p. 82.

or other representative", found in Section 3 of the 1926 Act, would appear primarily to mean a labor organization. The language is almost the same as that found in Section 6, which both in 1926 and 1934 similarly provided for notices and conferences with respect to changes affecting rates of pay, rules or working conditions, such as collective bargaining agreements.

In so far as the settlement of grievances was concerned, the 1926 Act was no more successful than the 1920 (Op., p. 12). The carriers still insisted on system boards and the unions on a national board. The boards previously established for train service employees were continued, however, and a new board created for the southwestern region. In addition, a number of system boards were created for other classes of employees.

The new train service agreement showed the effect of the changes in the law. The provision for adjustment by one hundred unorganized employees was eliminated. The agreements were declared to be between the carriers and "their employees represented by the following named organizations:"[24] The paragraphs required by the Act (quoted, *supra*, pp. 15-16) were included, but the agreement contained in addition (and perhaps in contradiction) substantially the same paragraph as the 1921 agreement that

> 10. Disputes which have been handled in the usual manner up to and including The Chief Operating Officer of the railroad (or someone officially designated to act for him) and in respect to which an agreement has not been reached, *shall be referred by the representative or representatives of the employee or employees to the Chief Executive Officer of the organization concerned* and if the contention of the employee or employees is approved by such executive officer, then The Chief Operating Officer of the railroad and *The Chief Executive Officer of the organization* con-

[24] Compilation, *supra*, p. 57.

> cerned *shall refer the dispute to* The Board with a full statement of the facts and all supporting data, whereupon The Board shall promptly set the case for hearing and give reasonable notice to said Chief Operating Officer and said Chief Executive Officer of the time and place of hearing.[25] [Italics supplied.]

In practical effect the result was that cases were presented to the Board only through the labor organizations on behalf of their members. This did not mean, however, that the presentation must be through the organization which had represented the craft in making the collective agreement. The system whereby persons employed as firemen or brakemen advanced to engineer or conductor work in order of seniority, and moved back to firing or braking when persons were laid off, resulted in each of the four train service brotherhoods having members who worked in the companion craft under the agreement of one of the other organizations. As a consequence, the long recognized practice had been for each organization to represent its own members in grievance cases, irrespective of whether they were working under the contract of another organization, although subject to the recognized interpretation of the agreement by the parties to it.[26] This was the procedure under the various train service adjustment agreements, to which all of these brotherhoods, of course, were parties. In order to clarify this procedure, in 1933 the Eastern and Western Train Service Agreements were supplemented by statements of understanding as follows:[26a]

> It is understood that under Article 8 any organization party to the agreement, may submit cases to the Board, but the Board, before hearing the case, shall request the organization holding the schedule on

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[25] *Id.*, at 59.

[26] See Appendix, *infra*, pp. 46-49.

[26a] Compilation, pp. 50, 56.

the particular railroad to advise the Board promptly of its interpretation of the rule involved.

If practices under the rule involved are concerned, the practices under the agreement shall be ascertained from the Management and the General Committee of the organization holding the agreement.

After obtaining such data, hearings shall be held and decision rendered in accordance with the provisions of the agreement.

It appears from this review of adjustment procedures prior to 1934 that the labor organizations party to the adjustment agreement alone were permitted to represent their members before the boards. Before cases reached the adjustment boards, claims were to be handled "in the usual manner", which, for union members, customarily meant through their union officials.[27] There was no suggestion that the union was to present proof of authority or power of attorney, and this was not required either on the properties or before the boards. Although individuals had a right to handle their grievances independently and occasionally did so, within the limitations indicated, *supra*, pp. 5-7, the vast majority of grievances were disposed of between carriers and unions or by an adjustment board on the assumption that such authority existed.

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[27] The "usual manner" of handling is described by the Attorney General's Committee on Administrative Procedure (S. Doc. No. 10, Part 4, 77th Cong., 1st sess., Monograph on Railway Labor, pp. 3-4) (Compilation, *supra*, at 230) as follows:

> Individual employees ordinarily first present their claims to their foremen or other immediate superiors. If the claims are granted, the case ends; if they are denied, the employee submits his case to his local union. If the local union rejects it, the case ends, otherwise, the representative of the local union takes up the question with the local superintendent of the carrier. If no settlement is reached, the case goes to the general superintendent, then to the general manager, and finally to the chief operating officer. Cases are customarily presented to carriers' chief operating officers by designated officials of national unions. The great preponderance of all disputes that arise are, of course, settled through negotiation at some one of the levels.

This assumption, we submit, has a very practical basis. Although individuals may have always had the legal right to handle grievances separately, the disparity between their bargaining power as individuals and that of the railroad company is as great in grievance cases as in negotiating contracts of employment. The individual handling his own grievance is at the mercy of the employer, since he has no economic strength with which to fortify his demands. Only when he acts collectively, with the strength of his fellow workers behind him, is there any equality of bargaining power, and any likelihood that he will be satisfied with the result. Thus, except in those cases in which the organization does not act in good faith in his behalf, the individual will secure a more satisfactory settlement if the organization handles his case. This is true even as to an employee not a member of the organization, in those cases in which it is willing to act in his behalf.

These elementary facts are known both to the carriers and the employees. The result is that unless an individual has some personal reason in a particular case, he prefers to have the organization represent him as a matter of course. And in the normal case, although he may not be aware of what transpires at each stage of the adjustment process, he will know that the union is handling his case with the carrier. The instances in which he would wish it to be otherwise will be few and will consist in the main of cases in which the employee has taken some affirmative step to handle the case himself or through another representative.

It is thus entirely reasonable both for the carrier and the law to assume that the union is acting with the authority, or at least the acquiescence of the employee, unless the contrary appears before the case is settled or otherwise concluded. Such a presumption is "justified on logical

grounds by human experience," and "it furthers a result deemed to be socially desirable,"[27a] as we shall show.

III

THE 1934 ACT CONTEMPLATED NO BREAK WITH PRIOR PRACTICE

This background was undoubtedly familiar to the draftsmen of the 1934 Act. The original bill was prepared by Coordinator of Transportation Eastman and his staff. The bill was explained to the Congressional committees by Mr. Eastman and also by Mr. George M. Harrison, spokesman for the Railway Labor Executives' Association, who had participated in its preparation.

One of the most important defects in the 1926 Act related to the machinery for the handling of grievances. The reasons why the provision in that Act for the establishment of adjustment boards by agreement failed are recited in this Court's opinion (pp. 12-13). In brief, boards frequently were not established, and there was no way for disposing of deadlocked cases. The new bill was designed to remedy these conditions by creating a national adjustment board which would always be available if regional or system boards were not established by agreement, and by providing for the appointment of referees to decide deadlocked cases.

But except for these changes it was obviously contemplated that the adjustment boards and the entire grievance ma-

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[27a] See Morgan, *Some Observations Concerning Presumptions*, 44 Harv. L. Rev. 906. Somewhat analogous presumptions are those as to the authority of persons acting as officers of corporations (*United States Bank* v. *Dandridge*, 12 Wheat. 64, 69-70), as to the authority of an automobile driver as agent of the owner (9 Wigmore, *Evidence* (3d ed. 1940), § 2510a; *Young* v. *Masci*, 289 U. S. 253, 259), as to the existence of title to property from the fact of possession (Wigmore, *supra*, at § 2515). In each of these cases the probability that the person acting as if he had authority or title actually does have it is so great as to warrant a court in assuming it unless the contrary is shown.

chinery operate substantially as they had before.[28] As has been stated (*supra*, pp. 15-17), the most pertinent provisions of the 1926 Act were not altered. Before both House and Senate Committees, Mr. Eastman and Mr. Harrison began their explanation of the proposed new Section 3 with a history of the predecessor adjustment boards.[29] Mr. Eastman pointed out that:

> Three national boards of adjustment had operated during the period of Federal control and, on the whole, very successfully. The employees wanted similar boards established when the railroads were returned to private control, but the carriers were unwilling to agree to national boards.[30]

Both he and Mr. Harrison indicated that the 1920 and 1926 Acts had sought to retain the benefits of the boards established under Federal control, but failed in this regard because the boards were to be created only by the agreement of parties who would not agree. In 1924 the employees had sought the enactment of a bill providing for a national board modeled on the 1918 adjustment machinery;[31] the carriers

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[28] It may be said that under the 1934 Act individuals for the first time were to be allowed to present grievances to the adjustment board. We agree that individual employees have such a right, but believe that it also existed under the 1926 Act, which contained the same language as the present paragraphs (i) and (j) of Section 3 First. See pp. 15-16 *supra*. This right does not seem to have been recognized in practice under the train service adjustment agreements or by the present Adjustment Board.

[29] See Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7650, 73rd Cong., 2d sess., pp. 45, 80; Hearings before Senate Committee on Interstate Commerce on S. 3266, 73rd Cong., 2d sess. pp. 15, 30.

[30] House Hearings, p. 45; Senate Hearings, p. 15.

[31] This was the Howell-Barkley bill, S. 2646, 68th Cong., 1st sess., which contained many provisions found in the subsequent Railway Labor Act. The bill was reported favorably to the Senate (S. Rep. 779, 68th Cong., 1st sess.), but the session ended before action was taken. In the House the bill was forced out of committee, but the tactics of the majority leadership prevented a vote on the merits. See Wolf, *Railroad Labor Board* (1927), 407-414.

opposed this, and the compromise measure of 1926, submitted by the organizations and the carriers jointly, was substituted in its stead. Finally, in 1934, it was thought necessary to return substantially to the 1918 pattern, as the labor organizations had consistently urged.

There is, of course, no specific mention in the history of the 1934 Act, or of the earlier laws for that matter, of the present problem. If the case were that easy this reargument would be unnecessary. The only controversial issue was as to the national character of the Board. There was no discussion at all of the details of grievance handling. The derivation of the adjustment provisions, as well as the general statements in the hearings indicate, however, that it was clearly understood by all that in its essential elements the processes of adjustment would continue as before.[32] See *Order of Railway Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 348, in which this Court stated:

[32] It is, of course, difficult to show the non-existence of a procedure which, because it does not exist, is nowhere mentioned in discussions of the general subject. We believe on the basis of our inquiries within both the government and the industry that it was common knowledge in the railroad industry in 1934, as well as since, that unions handled grievances without obtaining or producing individual authorizations from the employees. That this was the practice is, we think, confirmed by (1) the fact that union members could appear before the earlier adjustment boards only through the organizations, as set forth in the historical development in the text. (2) the carrier members of the First Division of the Adjustment Board, in refusing, after the Court's decision was rendered, to participate in any cases until authorizations were filed, stated that they "do not understand that any dockets we have now before us have any such authorization", (3) the many writers who have described grievance procedures on the railroads and generally never adverted to any necessity for authorization. Attorney General's Committee on Administrative Procedure, *supra*, p. 20, n. 27. Wolf, *The Railroad Labor Board* (1927), 51-52; Hoxie, *Trade Unionism in the United States* (1923), 264-267, 271-272; Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale Law Journal 567, 577; Pierson, *Collective Bargaining Systems* (1942), 12-13, 21, 27-29; Lapp, *How to Handle Labor Grievances* (1945); Henig, *The Brotherhood of Railway Clerks* (1937), 115, *et seq.;* Sidney and Beatrice Webb, *Industrial Democracy* (1920), 182-184, 203-204, 233-237; Florence Peterson, *American*

> Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States. • • •

We have so far been dealing with the procedures before the adjustment boards because the statutes and the legislative history were chiefly concerned with that. Since no tenable distinction can be drawn between the right of the union to act as representative in grievance cases in negotiating with the carrier on the property and before an adjustment board, the evidence that the prior practice was not to be changed with respect to cases before the boards would extend to the prior negotiations as well. But we are not left to conjecture as to that. For Section 3 First (i) expressly provides that grievances shall first "be handled in the *usual manner* up to and including the chief operating

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Labor Unions (1945), 231-237; *Labor and the Government*, Daugherty, Taylor, and Dash, all *supra*, note 1, p. 3.

The issue here, of course, is not whether a court should take judicial notice in a particular case of this industry practice but whether it was within the contemplation of Congress when the Act was passed. The railroad men who drafted the Act, and to whom Congress looked for guidance, were, of course, much more familiar with industry practice than the courts. The courts have, however, taken judicial notice of "the general customs and usages of merchants" (*Brown* v. *Piper*, 91 U. S. 37, 42) and of "the general and established usages of trade" (*Gibson* v. *Stevens*, 8 How. 383, 398), including the customary methods of railroad operation. *Southern Railway* v. *United States*, 222 U. S. 20, 27 (intermingling of traffic and trains); *Rice and Lockwood Lumber Co.* v. *Boston and Maine R. Co.*, 308 Mass. 101 (1941) (deliveries of freight customarily made to industrial plants equipped with sidings); *Hilton* v. *Southern Ry. Co.*, 192 S. C. 476 (1940) (duties of conductors); *C. C. C. & St. L. Ry. Co.* v. *Jenkins*, 174 Ill. 398, 402 (1898) ("the manner in which ordinary railroad business is conducted"). The same principle should apply to commonly known customs in the new branch of the "law merchant", the relationship between employer and employee, as much as to the relationship between seller and purchaser. The important fact, of course, is whether the custom is known to all persons familiar with the industry, not whether it is personally known to the judges before being brought to their attention. *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 63-64; *Shapleigh* v. *Mier*, 299 U. S. 468, 475.

officer of the carrier designated to handle such disputes''—language which was taken from the 1926 Act and the earlier agreements. The ''usual manner'' would seem to comprehend not only the presentation of the grievance to successively higher offices of the carrier[33] but other aspects of the procedure as well. And whether the phrase ''usual manner'' in and of itself specifically includes the manner of securing authorization, certainly it supports the conclusion that no change which would interfere with prior methods of settlement was anticipated. The usual manner of handling grievances had not been for the organizations to show express authority from the employees either on the property or before the adjustment boards, except possibly in cases in which the organization's authority was challenged by an employee or where an employee had acted through a different representative.

That grievances were to be handled through representatives in the usual manner also appears from Section 2 Sixth of the present Act (Section 2 Fourth in 1926). That paragraph provides that grievance cases shall be handled in conference between ''the designated representatives'' of the employees and the carriers. We do not read the quoted phrase as necessarily meaning the collective representative of the craft or class. But ''designated representative'' is an expression found with minor variations in form in other sections of the Act,[34] and in all its contexts is obviously primarily (see p. 17, *supra*)—even though perhaps not exclusively (see p. 8, *supra*)—intended to describe labor organizations designated by the employees in the manner

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[33] See the testimony of Mr. Richberg, Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7180, 69th Cong., 1st sess., p. 67.

[34] See Section 2, Second, Third, and Tenth; cf. Section 6. Indeed, the term "representative" is defined in Section 1, Sixth as meaning a person or organization "designated" by the employees to act for them.

customary in the industry. In the past, membership in a labor organization had always been regarded as sufficient to warrant the organization's acting as a "designated representative" without more.

IV

THE EFFECT OF REQUIRING INDIVIDUAL AUTHORIZATIONS UPON EFFECTUATION OF THE PURPOSE OF THE RAILWAY LABOR ACT

The well-known objective of the Railway Labor Act is to facilitate the settlement of disputes which may interrupt interstate railway transportation. The Act is entitled "* * * An Act to provide for the prompt disposition of disputes between carriers and their employees." And the declaration of purposes in Section 2 of the 1934 Act specifically states that a purpose of the Act is "(5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

In so far as grievances are concerned, the discussion before the Congressional committees shows that although a single grievance case would seldom be of sufficient importance to bring on a strike, the accumulation of unsettled disputes might well do so.[35] We believe that the effect of imposing the novel requirement that a labor organization must possess agency authority from each employee for whom it acts in handling grievance will be seriously to impair the effectiveness of the present grievance machinery both on the properties and before the adjustment board.

As has been indicated under the current practice (prior to June of this year), labor organizations made no effort to get special authorizations from employees before repre-

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[35] See House Hearings, *supra*, p. 81; Senate Hearings, p. 33.

senting them in grievance cases. Furthermore, although there is great diversity in this respect, many of their Constitutions, general rules and by-laws contain no over-all grant of authority over the subject; indeed few of them are as specific as the general rules of the Brotherhood of Railroad Trainmen which the Court has held in this case to be insufficient to show such authority on its face.[36] And yet the various organizations have handled grievances in substantially the same way irrespective of the differences in their governing laws.

The result of last Term's decision has been and will be that a union's authority to settle a grievance involving a claim for accrued damages will always be subject to challenge by an individual who does not get all he wants, unless the union has previously obtained an exceedingly explicit power of attorney to act on his behalf. This means that the carriers will be likely to demand proof of such authorization from every individual involved before undertaking to negotiate a grievance case, since they might otherwise be liable to any employee dissatisfied with the settlement. As we shall see, this has been what has happened on the Adjustment Board.

In many simple cases, of course, it will not be difficult for the organization to secure an authorization. In other types of cases, although many authorizations could probably be obtained, it might be impossible to obtain authority from every individual involved. And whether or not impossible, the process of securing necessary authorizations might be so prolonged as to prevent prompt disposition even of the many cases which would in the past have been speedily settled on the properties. A few illustrations will make the point clear.

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[36] We have obtained and examined copies of the Constitution and by-laws of most of the railroad labor organizations. The copies are available to the Court if it wishes to examine them.

(a) Many grievances affect in the same way all persons performing the same kind of work, as in a dispute relating to starting time or overtime under an agreement. A union handling such a case customarily acts on behalf of all affected persons, including non-members, and both the union and the carrier normally recognize the necessity of disposing of the matter in the same way for all those similarly affected. Indeed, lack of uniformity in the determination of such a dispute would tend to undermine employee morale and lead to further difficulties. It is obviously desirable that in such situations the claims of all the affected employees be handled at the same time, either by way of a general claim on behalf of all persons affected or through a test case which by common understanding will control the others. These were the devices by which this problem was handled until last June. "The prompt and orderly settlement of all disputes" sought by the Act can hardly be achieved if such matters are to be disposed of *seriatim* with some individuals holding back their claims to see how their fellows make out first.

(b) A seniority dispute may involve the question whether a single individual should be placed near the head or near the foot of the seniority roster. The position of every person in between will be dependent upon the determination of that individual's position. Each of these persons may suffer financial loss if the individual particularly concerned is given too high a place. Just how many and which persons are actually injured will depend on various factors, such as the amount of work available each day, who is ill or on furlough on particular days, and the like.

(c) Another example, which we take from the brief filed on behalf of the experienced counsel for the Railway Labor Executives' Association and the American Federation of Labor (p. 30), would be a case in which a carrier assigned

work covered by its agreement with one craft (e. g. yard work) to another craft (e. g. road conductors):[37]

> • • • Under such circumstances, it is apparent that some one employee of the first craft was entitled to perform work but was denied that opportunity. The question is "Which one?" In any department of a railroad the number of employees in active service and the number on furlough varies from day to day. Under the facts stated, the senior furloughed employee in the craft whose agreement has been violated should have been in active service during each day of the period of violation. This, however, would not be the same individual during the whole period. It might well be that dozens of employees would occupy the position of No. 1 man on the furloughed list during this time and each would have a claim growing out of this one violation. The situation is complicated by the fact that the senior furloughed man on any given day might not be qualified to perform the duties in question and hence would have no valid claim, while the No. 2 man might be qualified. This fact must be considered. It might also be that the duties wrongfully assigned to the outside employee would actually have been performed by qualified workers of the craft whose agreement was violated and who were actually in service during the whole period, but performing less desirable jobs. These individuals, too, have claims. They in turn may well have displaced others junior in seniority to themselves who were as a result out of work entirely. Accordingly, it is entirely possible that the ramifications of a single simple violation of a collective bargaining agrement may be such that over a period of months substantially every employee in a large shop, office or station will have been adversely affected. • • •

A serious effect of the rule requiring express authority is that the rule itself will induce some persons who would

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[37] Cf. *Order of Railway Conductors* v. *Pitney*, No. 37 this Term.

ordinarily permit the organizations to handle their claims to refuse to do so. If a particular employee grants the union power of attorney, he will be bound to accept what the union obtains for him whether he likes it or not. If he refuses an authorization, he can wait and see what happens; if the union makes a satisfactory settlement, he is in practice bound eventually to get the benefit of it by subsequently pressing his claim. If he is not satisfied, he can bring an independent proceeding on his own behalf. He thus will be able to take advantage of the collective presentation of his claim and also have an additional opportunity to get what he wants. The jockeying for position which such a situation might entail would in itself prevent an orderly and satisfactory disposition of the dispute.

We believe that Congress did not intend the statute to be construed in a way which would impair the efficacy of the preexisting system for settling grievances through introducing a new element of delay and by establishing a requirement which in many important situations could not be met.

The requirement of express authority has already seriously affected the operations of the National Railway Adjustment Board. Immediately after the decision, the First and Third Divisions of the Board, which hear 94% of the cases brought before the four divisions,[38] ceased to operate. They subsequently recommenced operation on a limited scale when the organizations were able to obtain authorizations. The carrier members of the Board have taken the position, and we do not suggest unreasonably in the light of the decision, that no cases will be handled unless the dockets contained some legally sufficient authorization to the representative, a requirement not met by any of the cases on

[38] See National Mediation Board, Ninth Annual Report, pp. 54-60.

file.[39] A subsequent disagreement as to whether an authorization and evidence as to one employee warranted a finding in favor of another, who had submitted an authorization but as to whom there was no separate evidence, resulted in the Labor members of the First Division refusing to sit in any further cases until the Carrier members withdrew from their position.[40] This has closed down the First Division of the Board again. In this Division in the four months, July through October, 1945, 141 awards have been entered as contrasted with 483 in the preceding four months and 296 in the same months of 1944.[41] In the Third Division between June and November 20, 1945, 14 cases were decided on the merits as contrasted with 120 during the preceding five months.[42] Certificates of authorization have been filed in a number of cases, but in many of these the certificates could not be obtained from all of the employees affected. The chairman of this Division has informed us that "In many cases it was practically impossible, if not absolutely impossible, to determine fully just which employees were entitled to compensation under an award and order of

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[39] This information was submitted to the Solicitor General's Office by the Carrier members of the First Division and by the Chairman of the Third Division.

[40] The Labor members were of the view that to interpret this Court's decision as requiring authorizations and evidence for every person similarly situated with respect to a general or blanket claim, instead of following the prior practice of leaving a single award to be applied generally on the property, would so encumber the Division with a mass of cases as to make it impossible for it to function in a useful manner. The Carrier members maintain that there are a sufficient number of cases in which authorizations have been filed to permit the Division to function at the normal rate without inconvenience, and that it is not this Court's decision but the conduct of the Labor members which has prevented the Division from functioning.

[41] This information was submitted to the Solicitor General's Office by the Secretary and the Carrier members of the First Division.

[42] This information was submitted to the Solicitor General's Office by the Chairman of the Third Division.

the Board, until after the award was made, forwarded to the parties and they had set about to apply it." [43]

Apart from its affect upon future cases, the newly imposed requirement of express authority suggests the invalidity of all prior settlements and adjustment board awards in cases involving accrued claims. Since no such authorizations have ever been obtained, individual employees may sue independently of any such settlements or awards not entirely satisfactory to them if the practice in this case is followed.

The requirement of individual authorizations obstructs in another way the attainment of the statutory objective of reducing conflict in railroad labor relations. On the whole, a peaceful relationship is more likely to be achieved if the handling of grievances through labor organizations is facilitated and encouraged rather than the contrary. In the first place, since the parties negotiate on an equal basis only if the employees act collectively, the disposition of cases handled by a labor organization is likely to be fairer to the individual workers and to result in less subsequent dissatisfaction. Furthermore, when grievances are handled collectively, the disposition of them will be more consistent and uniform, which in itself will tend to remove a cause of future dispute. Finally, it is the customary practice when grievances are handled by labor organizations to have them first submitted to the local lodge members or officials.[44] After discussion and debate the meritorious cases are winnowed out for submission to the carriers. The indi-

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[43] The Second and Fourth Divisions of the Adjustment Board have so few cases that they are unable to estimate with any degree of accuracy the affect the requirement of authorizations will have on the number of cases handled.

[44] This appears from the labor union constitutions referred to at p. 27, *supra*, and also from the exerpt from the monograph of the Attorney General's Committee on Administrative Procedure quoted *supra*, p. 20. See also

vidual usually abides by the decision of his organization as to which cases should be pressed, whether he has to or not. This sifting process lessens the number of cases in dispute with the carrier and is in itself a valuable aid to industrial harmony.

These advantages of collective action in the disposition of grievances are attainable to a large extent even though the employees have a right to represent themselves if they wish. For the employees—or at least union members—normally recognize the superiority from their own individual standpoint of collective representation, and seek to act independently of the organization only in special circumstances where they have no confidence in the labor organization as their representative. The right of the individual to separate representation thus is a valuable but infrequently used safety valve available in exceptional cases. If the signing of an authorization or power of attorney is a necessary prerequisite to repre-

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the testimony of Vice President William Doak of the Brotherhood of Railroad Trainmen on the 1926 Act (Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7180, 69th Cong. 1st sess., p. 203):

> * * * first of all, if a man has a grievance he must submit it to his local lodge and get the majority of the members present at that meeting employed on the division or district where he is employed to sanction it before it can be taken up by his local committee. That is the first thing. Secondly, it is referred to the local committee and they have a right to amend the grievance or handle it in any way they see fit and report back to the local lodge. The lodge can drop the case or it may be referred to the general committee, which general committee consists of the local chairmen from the respective divisions, who, with the officials of the railway, elect their own chairman.
>
> It can be handled by that general committee or thrown out as they see fit. Under this machinery, after it has gone through all this routine the case can go to the general manager, or the chief operating officer of the railroad, and with him conferences, be held and if the parties could not agree an appeal to the president, may be made, if it is wanted or, to the highest officer of that railroad before any of the machinery of this bill would be involved. Then if it was a grievance it would go to the adjustment board. * * *

sentation by the organization, some employees who would not affirmatively object to collective representation will not sign, out of inertia or a mere reluctance to commit themselves, as well as for other reasons. The effect of requiring express authority will be to shift the burden of positive action from the man who does not wish to be represented by the union, upon whom it has heretofore rested, to the man who does. We think that this change "in the usual manner" of handling grievances is not in accord with the statute's objectives or within the contemplation of Congress.

Another departure from the prior practice required by the present decision is its differentiation between those claims which relate to the past and those which concern the future. However familiar the distinction between a damage suit and an equity or injunction proceeding operating *in futuro* may be to a lawyer, it has never been regarded as significant in the resolution of labor disputes. In that field the line is an artificial one without relation to economic reality. Whether a grievance be handled by the organization or an individual, it will frequently involve a dispute as to what should be done and as to what has been done upon the same matter. A reasonable settlement will take both into account. As in the instant case, a carrier may abandon its contention as to the future in return for labor's abandonment of its claim as to the past. Such settlements made in good faith seem entirely reasonable and no barrier should be put in their way. They will be obstructed, however, if the organization may handle a controversy as to the future without restriction but may not touch the past phase of the same dispute without express authority. Since no such distinction had ever been drawn or suggested in the past, we do not think that Congress meant to embody it in the Railway Labor Act.

Conclusion

Our conclusion is that the history of the Act and of railway labor disputes in particular relation to grievance handling, the over-all scheme embodied in the statute, as well as the specific provisions, and the purpose of the Act all show that Congress intended the preexisting system for disposing of grievances to be used without any substantial modification pertinent here. See *Order of Railway Telegraphers* v. *Railway Express Agency*, 321 U. S. at 346. Under that system, the vast majority of the cases were handled by the labor organizations without express authority—and also without question by anyone. It was also permissible for the individual to handle his grievance through another or no representative if he saw fit. But unless he did so or otherwise gave some notice that he objected to representation by the labor organization holding the contract for the craft or class, it was assumed as a matter of course that the union was entitled to act for him. This procedure, particularly when coupled with the obligation to represent in good faith recognized in *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, affords the individual or minority adequate protection without curtailing the effectiveness of the accepted and normal method of previously settling grievance cases. For these reasons, we believe that the Act should be read as manifesting a legislative intention that grievances continue to be handled in the usual manner, and that unless the carrier is in some way put on notice that the organization has no authority, settlements between the carrier and the organization are binding upon the individual employees.

The Court's opinion suggests that a different determination of the question as to the authority of the Brotherhood would require other points to be decided, including "the important issue concerning the finality and conclusive effect

of the award'' (Op. p. 29). It is our view that if in the circumstances it cannot be said that the union lacked authority to represent respondents, the settlement agreement of October 31, 1938, disposes of the controversy irrespective of the weight to be attached to the Adjustment Board award or its reviewability.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

ROBERT L. STERN,
Special Assistant to the Attorney General.

NOVEMBER 1945.

APPENDIX A

PERTINENT PROVISIONS IN THE 1920, 1926, AND 1934 RAILWAY LABOR STATUTES

1. Transportation Act of 1920, Title III, 41 Stat. 456, 469:

SEC. 302. Railroad Boards of Labor Adjustment may be established by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof.

SEC. 303. Each such Adjustment Board shall, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon the written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, (3) upon the Adjustment Board's own motion, or (4) upon the request of the Labor Board whenever such board is of the opinion that the dispute is likely substantially to interrupt commerce, receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving only grievances, rules, or working conditions, not decided as provided in section 301, between the carrier and its employees or subordinate officials, who are, or any organization thereof which is, in accordance with the provisions of section 302, represented upon any such Adjustment Board.

* * * * * * *

SEC. 307. (a) The Labor Board shall hear, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions, in respect to which any Adjustment Board certifies to the Labor Board that in its opinion the Adjustment Board has failed or will fail to reach a decision within a reasonable time, or in respect to which the Labor Board determines that any Adjustment Board

has so failed or is not using due diligence in its consideration thereof. In case the appropriate Adjustment Board is not organized under the provisions of section 302, the Labor Board, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions which is not decided as provided in section 301 and which such Adjustment Board would be required to receive for hearing and decision under the provisions of section 303.

(b) The Labor Board, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, all disputes with respect to the wages or salaries of employees or subordinate officials of carriers, not decided as provided in section 301. The Labor Board may upon its own motion within 10 days after the decision, in accordance with the provisions of section 301, of any dispute with respect to wages or salaries of employees or subordinate officials of carriers, suspend the operation of such decision if the Labor Board is of the opinion that the decision involves such an increase in wages or salaries as will be likely to necessitate a substantial readjustment of the rates of any carrier. The Labor Board shall hear any decision so suspended,

and as soon as practicable and with due diligence decide to affirm or modify such suspended decision.

* * * * * * *

2. Railway Labor Act of 1926, 44 Stat. 577.

GENERAL DUTIES

SEC. 2. First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier and its employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.

Fourth. In case of a dispute between a carrier and its employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such con-

ference shall be held: *Provided,* (1) That the place so specified shall be situated upon the railroad line of the carrier involved unless otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this paragraph shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Fifth. Disputes concerning changes in rates of pay, rules or working conditions shall be dealt with as provided in section 6 and in other provisions of this Act relating thereto.

BOARDS OF ADJUSTMENT—GRIEVANCES—INTERPRETATION OF AGREEMENTS

SEC. 3. First. Boards of adjustment shall be created by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employees.

The agreement—

(a) Shall be in writing;

(b) Shall state the group or groups of employees covered by such adjustment board;

(c) Shall provide that disputes between an employee or group of employees and a carrier, growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, that the dispute shall be referred to the designated adjustment board by the parties, or by either party, with a full statement of the facts and all supporting data bearing upon the dispute;

(d) Shall provide that the parties may be heard either in person, by counsel, or by other representative, as they may respectively elect, and that adjustment boards shall hear and, if possible, decide promptly all disputes referred to them as provided in paragraph (c). Adjustment boards shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in the dispute;

(e) Shall stipulate that decisions of adjustment boards shall be final and binding on both parties to the dispute; and it shall be the duty of both to abide by such decisions;

(f) Shall state the number of representatives of the employees and the number of representatives of the carrier or carriers on the adjustment board, which number of representatives, respectively, shall be equal;

(g) Shall provide for the method of selecting members and filling vacancies;

(h) Shall provide for the portion of expenses to be assumed by the respective parties;

(i) Shall stipulate that a majority of the adjustment board members shall be competent to make an award, unless otherwise mutually agreed;

(j) Shall stipulate that adjustment boards shall meet regularly at such times and places as designated; and

(k) Shall provide for the method of advising the employees and carrier or carriers of the decisions of the board.

Second. Nothing in this Act shall be construed to prohibit an individual carrier and its employees from agreeing upon the settlement of disputes through such machinery of contract and adjustment as they may mutually establish.

3. Railway Labor Act of 1934, 48 Stat. 1185.

GENERAL PURPOSES

SEC. 2. The purposes of the Act are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

GENERAL DUTIES

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * * * * *

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class

of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * * * *

Sixth. In the case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so

specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

* * * * *

Sec. 3. First. * * *

* * * * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

* * * * *

Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such in-

tended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

APPENDIX B

Findings and rulings of the District Court in *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338, October Term 1943, Nos. 27, 41, the National Mediation Board, and an emergency board on the handling of grievances:

1. In the *Matter of Delaware, Lackawanna & Western R. Co.*, Nos. M-199 and R. 358, decided August 13, 1937, the Mediation Board declared (p. 7):

> After the majority representatives made the agreement for the craft or class, individual employees were given the right to select their representatives for dealing with grievances arising under the agreements and such individual grievances were to [be] adjudicated by the National Railroad Adjustment Board, which was given the authority to interpret the agreements made and apply the interpretation to the individual grievances of employees.

2. From Transcript of Record, Supreme Court, October Term, 1943, No. 27, *General Committee* v. *Southern Pacific Company.*

a. Findings of Fact of Judge Louderback (R. 48-50):

7. (a) In the operation of Pacific Lines, there arise individual claims and grievance cases, involving dis-

putes between individual employees and defendant as to their respective rights under the agreements referred to in paragraph 5 and as to matters not covered by said agreements. It is and ever since long prior to the enactment of the Railway Labor Act has been the custom for an engineman who has an individual claim arising out of any such dispute, and who desires the Firemen's or Engineers' Brotherhood (or other representative) to represent him in presenting and handling to conclusion the claim against defendant, to select whichever brotherhood (or other representative) he desires. In such cases a claimant engineman is not and never has been required to choose as his representative the brotherhood or labor organization selected as a representative for collective bargaining by the majority of employees in the service in which the claimant was employed when the dispute arose.

(b) The usual manner of handling such individual claims is and since long prior to the enactment of the Railway Labor Act continuously has been for the claimant to select as his representative the brotherhood of which he is a member, regardless of the craft or class in which he was employed when the dispute arose. In a limited number of cases, the claimant presents or has presented his claim to defendant directly and without representation, or he selects or has selected another organization or individual to represent him. Such presentation and handling to conclusion of a claim by the individual directly concerned, or a representative other than the brotherhood to which claimant belongs, is within the scope and meaning of the "usual manner of handling." When a claim, after initial presentation to defendant, is handled further with defendant's officers, or subsequently presented to the National Railroad Adjustment Board, it is usually handled by the same brotherhood (or other representative selected by the claimant) as presented *the* the claim to defendant.

(c) On almost every railroad in the United States, all individual claims, grievances and disputes of enginemen against their employers, whether within the

scope of a collective bargaining agreement or not, and whether involving rights arising from such agreement or not, are and from a date long prior to the passage of the Railway Labor Act have been handled in the manner hereinabove set forth as applicable to defendant's Pacific Lines, and such was at all said time and is now the usual manner of handling such claims.

b. Letter from Member Carmalt of the National Mediation Board (R. 216, 217-218):

Subsequent to the abrogation of the Chicago Joint Agreement, effort was made by the B. of L. E. to have the contracts on many railroads so amended as to give to the General Adjustment Committee of the Engineers the exclusive right to represent engineers in disputes with management. This contention, as well as that of the two cases heretofore cited, ignores entirely the provision of the Chicago Joint Agreement in which it was conceded that the jurisdiction of the B. of L. E. extended over the craft of engineers, and that of the B. of L. F. & E. over the employees engaged as firemen, hostlers and hostler helpers, with the further proviso that the members of each Organization had the right to call in the Committee of their own Organization to represent them in grievance cases but under the interpretation of the contract made by the Organization which held the contract. On only one Class I Railroad did the engineers succeed in getting the exclusive right of representation. The policy of the B. of L. E. in this regard is not only in violation of the Chicago Joint Agreement but is also in violation of the amended Railway Labor Act, as will be discussed later.

* * * * * * *

The National Mediation Board is compelled to view as a matter of law that the supplemental contract effective October 17, 1928, with the B. of L. E. is absolutely illegal, since the Company interprets it to

give to the engineers' committee a right to represent any employee who desires another representation. No contract between a railroad employer and an organization of employees can give to that organization any right to represent an individual employee unless the employee himself assents. * * *

c. Letter from Chairman Leiserson of the National Mediation Board (R. 230-231):

As the Board understands the facts they are:

(1) The case involves grievances of six engineers who have been disciplined or discharged and who desire to discuss their grievances with the General Superintendent.

(2) The men are members of the Brotherhood of Locomotive Firemen and Enginemen.

(3) They desire to be represented, in conferring with the General Superintendent, by the Vice President of this Brotherhood, who is not an employee of the Florida East Coast Railroad.

(4) The contract covering the engineers is with the Brotherhood of Locomotive Engineers.

(R. 234-235):

The question resolves itself, therefore, down to the problem whether a labor organization to which the engineers belong, but which does not hold the contract covering all the engineers, may, in cases of individual grievances, be designated by the aggrieved employees to represent them in conferences with the management.

The Board finds that it has been a common practice on the railroads generally to handle cases of individual grievances on appeal to higher officials in conferences between such officials and officers of labor organizations regardless of whether these were employees of the carriers or not; and that it has been quite common

for officers of employees' organizations to represent aggrieved employees in such conferences with higher officials even though these organizations did not happen to hold the contracts covering the class of such employees.

In view of this common practice, the Board is of the opinion that in conferences between carriers and employees to consider grievances of employees who have already been disciplined and have carried their cases to higher operating officials, the "usual manner" of handling such cases has been to permit aggrieved employees to designate representatives for such conferences without regard to whether the representatives were employees of the carrier or not, or whether they were officers of an organization which held a contract or not.

The Board therefore holds that the management is required both by Section 2, Second, and Section 3 (i) of the Railway Labor Act, as amended, to confer with the representative of the Brotherhood of Locomotive Firemen and Enginemen whom the six engineers designated as their representative for handling their grievances.

By order of the National Mediation Board.

WM. M. LEISERSON,
Chairman.

d. Excerpt from report of an Emergency Board under the Railway Labor Act (R. 738)—

In the present case, the Carrier, in making the agreement of February 27, 1936, offended not only against the plain intent of the law, but broke its specific agreement with the Brotherhood of Locomotive Firemen and Enginemen, several times reaffirmed, that any engineer member of the latter Organization can have the regularly constituted committee of his Organization represent him in the handling of grievances. There was no restriction in the Firemen's Agreement upon this right. The interpretations of rules were to be made in accordance with the recognized interpretation

agreed upon between the Carrier and the Organization holding the contract, but there was no limitation upon the right of an engineer member of the Brotherhood of Locomotive Firemen and Enginemen to have the committee of his Organization represent him in handling the case, under the recognized interpretation of the rule applying to his case.

(R. 742-743):

We find that—

(1) As interpreted by officers of the Brotherhood of Locomotive Engineers, and certain officers of the Southern Pacific Company, Pacific Lines, the Agreement of February 27, 1936, entered into between the Carrier and the officers of this Organization, has adversely affected rights of the Brotherhood of Locomotive Firemen and Enginemen secured to them by their Agreement with the Carrier in Article 51, Section 1, of the Firemen's Agreement of May 1929, and secured to them by the Railway Labor Act.

(2) The Agreement of February 27, 1936, should, therefore, be cancelled.

(3) The evidence presented in this case indicates clearly that this can be done without adversely affecting the just interests of the parties to the Agreement:

(a) If in conformity with its own understanding of the recognized or agreed upon interpretation of the rule involved, the Carrier promptly makes its awards on claims for adjustment of grievances brought to it by representatives of the persons making the claims.

(b) If the Carrier promptly furnishes copies of its awards to officers of Organizations having an interest in them, either because they hold an Agreement with the Carrier, a rule of which is being applied, or because they represent the party making the claim as a member of their Organization.

(c) If in the event claims are compromised, this fact is clearly noted and as a matter of standard practice, it

is stated that compromised awards are made without prejudice to the rule of the working agreement in question.

(d) If the Organization holding the Agreement avails itself of existing remedies to correct any misinterpretation of its rules involved in a settlement made by the Carrier.

APPENDIX C

STATEMENTS ON GRIEVANCES CONTEMPORANEOUS WITH THE PASSAGE OF RAILWAY LABOR ACT OF 1934

In the spring of 1934 Senator Wagner introduced the forerunner of the National Labor Relations Act (S. 2926, 73d Cong., 2d Sess.). The bill, as reported out of the Senate Committee, contained a provision for majority rule when the Board so decided, with the proviso that "nothing in this Act shall be construed to prohibit an employer from discussing grievances with an employee or groups of employees at any time." (Sec. 10 (a)). The Senate Committee report (No. 1184, p. 8) stated in respect to this provision:

> Although the representatives of the majority may make the agreement for that unit, the minority have a right *through representatives or otherwise* to present grievances to their employer. [Italics supplied.]

This report was submitted on May 26, 1934.[1]

The proposed bill was not passed. In its stead Congress enacted Public Resolution No. 44 (48 Stat. 1183) which authorized the President to establish boards to decide controversies under Section 7 (a). The resolution was approved by the President on June 19, 1934, two days before he approved the Railway Labor Act amendments. The text of the Resolution throws no light upon the problem; but on June 28, a week after he signed the Railway Labor Act, the

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[1] The committee reports on the Railway Labor Act (S. Rep. 1065, H. Rep. 1944, 73d Cong., 2d Sess.) were submitted on May 21 and June 11, 1934, respectively.

President created the National Steel Labor Relations Board (Executive Order 6751). Section 3 of this Order authorized the Board to hold elections to determine representation, and then provided—

> • • • After each such election the Board shall certify the results to all concerned, and the person, persons, or organization certified as the choice of the majority of those voting shall be accepted as the representative or representatives of said employees for the purpose of collective bargaining, *without thereby denying to any individual employee or group of employees the right to present grievances,* to confer with their employers, *or otherwise to associate themselves and act for mutual aid or protection.* [Italics supplied.]

Executive Order No. 6858, September 26, 1934, creating the Textile Labor Relations Board, contained identical language. See to the same effect the order of the Administrator of the Petroleum Code, dated March 8, 1935, defining the functions of the Petroleum Labor Policy Board (printed in United States Department of the Interior, *Decisions of the Petroleum Labor Policy Board,* pp. ix-x).

The Order establishing the first National Labor Relations Board,[2] issued on June 29, 1934, contained no such provision (Executive Order No. 6763). But in its leading decision on the question of majority rule, *In the Matter of Houde Engineering Corp.,* National Labor Relations Board Decisions, July 19, 1934—June 16, 1935, p. 35, decided August 30, 1934, the Labor Relations Board relied upon and quoted Principle 15 of the old Railroad Labor Board, and also referred to the Railway Labor Act Amendments passed shortly before. The Board also approved the limitation upon the doctrine as set forth in the Executive Order creating the Steel Labor Board. The Board stated in this connection (*ibid.*):

> In concluding this opinion the Board wishes to indicate the limits beyond which it does not go. The rule

[2] This Board was the predecessor to the present Board.

here announced is to be applied, in the language of the Executive Order of June 28 just referred to, "without denying to any employee or groups of employees the right to present grievances, to confer with their employers, or to associate themselves and act for mutual aid or protection."

The same principles were applied by the Petroleum Labor Policy Board created by the Administrator of the Petroleum Code; its concluding report to the Petroleum Administrator stated:[3]

> * * * the principle was laid down that a majority of any craft or class of employees shall have the right to determine who shall be the representative of that class or craft for collective bargaining. While developing this principle, at the same time the Board has recognized the rights of individuals or groups to represent themselves or be represented by counsel or other representatives in cases of grievances or other matters not affecting the collective bargain for the whole class or craft of employees.

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[3] See United States Department of the Interior, Petroleum Labor Policy Board, *Report to the Petroleum Administrator*, dated August 17, 1935 (mimeographed).

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SUPREME COURT OF THE UNITED STATES.

No. 160.—October Term, 1944.

Elgin, Joliet and Eastern Railway Company, Petitioner, *vs.* G. W. Burley, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[March 25, 1946.]

Mr. Justice Rutledge delivered the opinion of the Court.

We adhere to our decision rendered in the opinion filed after the first argument. 325 U. S. 711.[1] That opinion expressly refrained from undertaking to make a definitive statement of what might be sufficient evidence of the collective agent's authority either to settle finally the aggrieved individual employee's claims or to represent him exclusively before the Adjustment Board. We do not attempt to do so now. For whether the collective agent has such authority is a question which may arise in many types of situations involving the grievances either of members of the union or of nonmembers, or both, and necessarily therefore no all-inclusive rule can be formulated for all such situations. But neither does this mean that an equally all-exclusive rule must be followed, namely, that authority can be given or shown only in some particular way.

The question whether the collective agent has authority, in the two pertinent respects, does not turn on technical agency rules such as apply in the simple, individualistic situation where P deals with T through A about the sale of Blackacre. We are dealing here with problems in a specialized field, with a long background of custom and practice in the railroad world. And the fact that § 3 First (i) provides that disputes between car-

[1] The petition for rehearing, which resulted in setting the case for reargument, was supported by motions filed amicus curiae by various labor organizations and by the office of the Solicitor General. Upon granting of the motions, those organizations and the Solicitor General filed briefs amicus curiae and the latter participated in the argument. Various positions were taken upon the merits which we have considered but do not find it necessary to set forth.

riers and their employees arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions "shall be handled in the usual manner" up to and including the chief operating officer of the carrier, indicates that custom and usage may be as adequate a basis of authority as a more formal authorization for the union, which receives a grievance from an employee for handling, to represent him in settling it or in proceedings before the Board for its determination.[2]

Moreover, when an award of the Adjustment Board involving an employee's individual grievance is challenged in the courts, one who would upset it carries the burden of showing that it was wrong.[3] Its action in adjusting an individual employee's grievance at the instance of the collective bargaining agent is entitled to presumptive weight. For, in the first place, there can be no presumption either that the union submitting the dispute would undertake to usurp the aggrieved employee's right to participate in the proceedings by other representation of his own choice, or that the Board knowingly would act in disregard or violation of that right. Its duty, and the union's, are to the contrary under the Act.[4]

Furthermore, the Board is acquainted with established procedures, customs and usages in the railway labor world. It is the specialized agency selected to adjust these controversies. Its expertize is adapted not only to interpreting a collective bargaining

[2] Furthermore, so far as union members are concerned, and they are the only persons involved as respondents in this cause, it is altogether possible for the union to secure authority in these respects within well established rules relating to unincorporated organizations and their relations with their members, by appropriate provisions in their by-laws, constitution or other governing regulations, as well as by usage or custom. There was nothing to the contrary in our former opinion. We only ruled that on the showing made in this respect, which included controverted issues concerning the meaning and applicability of the union's regulations, and the effects of custom and usage, we could not say as a matter of law that the disputed authority had been given.

[3] In a somewhat different connection, which however we think not without weight here, § 3 First (p) provides that the Board's award "shall be prima facie evidence of the facts therein stated" in the statutory suit provided for enforcement of awards.

[4] The contrary practice noted in our former opinion, 325 U. S. 732-733, has been due without question, we think, to the Board's erroneous conception, accepted generally also by the unions and strongly urged in this case especially upon the reargument, that the Act itself, notwithstanding the provisions particularly of § 3 First (j) and the proviso to § 2, Fourth, confers exclusive statutory power upon the collective agent to deal with the carrier concerning individual grievances and to represent the aggrieved employee in Board proceedings.

agreement,[5] but also to ascertaining the scope of the collective agent's authority beyond what the Act itself confers, in view of the extent to which this also may be affected by custom and usage.

We also pointed out that the Act imposes correlative affirmative duties upon the carrier, the collective agent and the aggrieved employee to make every reasonable effort to settle the dispute.[6] It would be entirely inconsistent for the Act to require the carrier and the union to negotiate concerning the settlement of the grievance and, while withholding power from them to make that settlement effective finally as against the employee, to relieve him altogether of obligation in the matter. Not only is he required to take affirmative steps. His failure to do so may result in loss of his rights.[7]

It is not likely that workingmen having grievances will be ignorant in many cases either of negotiations conducted between the collective agent and the carrier for their settlement or of the fact that the dispute has been submitted by one or the other to the Adjustment Board for determination. Those negotiations, as the Act requires, are conducted on the property. § 2 Sixth. Ordinarily submissions are not and the statute contemplates that they shall not be, made to the Board until after all reasonable efforts to reach an agreement have been exhausted in good faith.[8]

In view of these facts there cannot be many instances in which an aggrieved employee will not have knowledge or notice that

[5] We recently emphasized this in Order of Railway Conductors *v.* Pitney, No. 37, October Term 1945, decided January 14, 1946, in which we said: "Since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom that, too, must be taken into account and properly understood. The factual question is intricate and technical. An agency specially competent and specifically designated to deal with it has been created by Congress."

[6] See 325 U. S. 711 at notes 12, 18 and text. We said: "The obligation [to negotiate] is not partial. In plain terms the duty is laid on the carrier and employees alike, together with their representatives; and in equally plain terms it applies to all disputes covered by the Act, whether major or minor." Note 18. Cf. Virginian Ry. Co. *v.* System Federation, 300 U. S. 515, 548; Trainmen *v.* Toledo, P. & W. R. Co., 321 U. S. 50, 57 ff.

[7] Even the ordinary law of agency attributes authority to a representative to act when the principal stands by with knowledge or notice of his assumption of that authority and permits the third person to act to his injury upon the same assumption. Cf. Seavey, The Rationale of Agency (1920) 29 Yale L. J. 859, 873 *et seq.*; and other authorities cited in Mechem, Cases on the Law of Agency (3d ed.) 186, note. And of course the assumption that even so-called common law rules of agency allow no room for the play of usage and custom is, to say the least, naive.

[8] Cf. note 6 and authorities cited.

negotiations affecting his claim are being conducted or, if they fail, that proceedings are pending before the Board to dispose of it.[9] Although under our ruling his rights to have voice in the settlement are preserved, whether by conferring with the carrier and, having seasonably done so, refusing to be bound by a settlement reached over his protest, or by having representation before the Board according to his own choice, we did not rule, and there is no basis for assuming we did, that an employee can stand by with knowledge or notice of what is going on with reference to his claim, either between the carrier and the union on the property, or before the Board on their submission, allow matters to be thrashed out to a conclusion by one method or the other, and then come in for the first time to assert his individual rights. No such ruling was necessary for their preservation and none was intended.

It may be, as we said previously, that respondents upon the further hearing will find it difficult to sustain their allegations, whether with reference to knowledge or notice in the material respects concerning which they have denied having it or otherwise. But whether this burden will be easy or impossible to carry, they are entitled to undertake it in the forum where such issues properly are triable.

The judgment is affirmed and the cause is remanded for further proceedings consistent with this opinion and the previous opinion filed in this cause.

Mr. Justice JACKSON took no part in the consideration or decision of this case on the reargument.

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[9] We pointed out in the former opinion that § 3 First (j) expressly provides that "the several divisions of the Adjustment Board shall give due notice of all hearings *to the employee* or employees and the carrier or carriers involved in any dispute submitted to them," 325 U. S. at 731, 734, and this provision, with the emphasis we placed upon the phrase "to the employee" and the conjunction of the provision for "due notice" with the provision for representation "in person, by counsel, or by other representatives," was one of the statutory mainstays for our conclusion that the Act did not give the collective agent the exclusive powers over the settlement of grievances claimed for it.

But we did not undertake to define what was meant by "due notice," nor do we now. "Due notice" conceivably could be given or had in a variety of forms, more especially when account is taken of the generally informal procedure of the Board. It would require at the least, we think, knowledge on the aggrieved employee's part of the pendency of the proceedings or knowledge of such facts as would be sufficient to put him on notice of their pendency.

SUPREME COURT OF THE UNITED STATES.

No. 160.—October Term, 1944.

Elgin, Joliet and Eastern Railway Company, Petitioner, *vs.* G. W. Burley, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[March 25, 1946.]

Mr. Justice Frankfurter dissenting.

The Chief Justice, Mr. Justice Burton, and I are of opinion that the judgment should be reversed. Last Term a divided Court held that a determination by the Adjustment Board of a dispute brought before it by a union recognized as the collective bargaining agent on behalf of its members is not binding, and may be upset in a district court in an independent suit involving the construction of the collective agreement, but brought by an individual member on his own behalf. 325 U. S. 711. The dissent expressed the view that "to allow such settlements to be thus set aside is to obstruct the smooth working of the Act. It undermines the confidence so indispensable to adjustment by negotiation which is the vital object of the Act." *Id.* at 755-56.

The Court now announces that it "adheres" to its decision. But as we read the Court's interpretation of its original opinion, it "adheres" to it by extracting from it almost all of its vitality. We say "almost" because the one thing that remains is the conclusion that the determination by the Adjustment Board that the recognized union represented its members is allowed to be reopened not before the Board but anew in the courts, State or federal, in an independent suit by a member of the union against the carrier. To be sure, the prospects for redetermination are largely illusory because the Court now erects a series of hurdles which will be, and we assume were intended to be, almost impossible for an employee to clear. But since litigation is authorized and hope springs eternal in a litigant's breast, the far-reaching mischief of unsettling nonlitigious modes of adjustment under the machinery of the Railway Labor Act largely remains. When peaceful settle-

ments between carriers and the Brotherhoods are subject to such hazards, the carrier can hardly be expected to negotiate with a union whose authority is subject to constant challenge. It was this dislocation of settled habits in adjusting railroad labor relations which evoked a series of petitions for rehearing from the United States, the Brotherhoods, the Railway Labor Executives' Association, and the organizations of industrial and craft unions. All the interests primarily concerned and best informed on these matters were aroused because for them the opinion destroyed the capacity of the Railway Labor Act to fulfill its function, ignored the normal practices of the industry, and impaired the rights of collective bargaining generally. Because of this unsettling effect, not abated by the present decision's adherence to the prior by adding new complexities—complexities so inimical to healthy relations on the railroads—we deem it appropriate to add to what was said in the original dissent. 325 U. S. 711, 749.

That these mischiefs are real and potent is attested by the arguments presented by the *amici curiae*. The United States points out:

> "The result of last Term's decision has been and will be that a union's authority to settle a grievance involving a claim for accrued damages will always be subject to challenge by an individual who does not get all he wants, unless the union has previously obtained an exceedingly explicit power of attorney to act on his behalf. This means that the carriers will be likely to demand proof of such authorization from every individual involved before undertaking to negotiate a grievance case, since they might otherwise be liable to any employee dissatisfied with the settlement. As we shall see, this has been what has happened on the Adjustment Board.
>
> In many simple cases, of course, it will not be difficult for the organization to secure an authorization. In other types of cases, although many authorizations could probably be obtained, it might be impossible to obtain authority from every individual involved. And whether or not impossible, the process of securing necessary authorizations might be so prolonged as to prevent prompt disposition even of the many cases which would in the past have been speedily settled on the properties."

The Brotherhoods of Locomotive Engineers and of Railroad Trainmen thus summarize the effect of the Court's decision:

> "The impact of the Court's decision on the processes of grievance adjustment has already appeared in the suspension of the function of the National Railroad Adjustment

Board and in indicated difficulties on various railroad properties. It is our conviction that unless this decision be reversed or substantially modified, the prompt and orderly settlement of such disputes will be impeded to a serious degree. The holding upsets long established techniques of grievance handling by employee representatives and adversely affects the administration and enforcement of the collective agreements.

We point out, first, that the Court's decision construes the Railway Labor Act in a way which frustrates the purposes which Congress had in mind in providing for the settlement of grievance disputes."

"The shutting down of the Adjustment Board because of the difficulty or the impossibility of securing authorizations is only one development of the decision. We are advised that some managements are insisting that local chairmen furnish powers of attorney in day to day adjustments. Considering the various factors involved such as the volume of the grievances, the extra burden placed on the committees, and the additional delays which would be encountered, the task of compliance with the technique required by the Court's decision seems calculated to cause a breakdown of grievance handling by employee representatives. It is obvious that handling by individuals or on an individual basis will not work. Such a breakdown, or even the impairment of collective handling as traditionally practiced, will be serious, as prior history shows."

"Second, the decision impairs the functioning of employee representatives under the Act, and has an adverse effect upon the maintenance of craft agreements. Representatives of employees have the statutory right and duty (1) to confer with management respecting *all* disputes (§ 2 Second) and specifically those arising out of grievances or out of the interpretation or application of agreements (§ 2 Sixth); and (2) to represent a craft or class for the purposes of the Act (§ 2 Fourth). The latter, of course, includes the right to negotiate craft agreements. Employees, acting through representatives, have the right to make and maintain agreements and to settle *all* disputes (§ 2 Fourth, § 1 First). These provisions, we believe, spell out collective bargaining rights with which the Court's decision interferes."

The Railroad Labor Executives' Association and the American Federation of Labor make this analysis:

"In summary, therefore, we submit that the regulatory scheme of the Railway Labor Act requires for its effective operation a recognized authority in the collective bargaining

representative to proceed in its own right to adjust disputes regarding the interpretation or application of agreements. A denial of that right will produce no real benefits to individual employees, will impair the effectiveness of representatives as stabilizing influences in this field, will deprive the carriers of any agency to which they may go to secure a final settlement of many vexatious labor controversies and will bring about a general deterioration of relations between employees and management which will necessarily impair the paramount interest of the public in uninterrupted transportation.

We respectfully submit that these results already experienced or reasonably to be anticipated from the interpretation which has been given to the Railway Labor Act are inimical to the whole purpose of the statute and should not be maintained."

"The decision of the court in effect outlaws a method which has been successfully followed for a quarter of a century in the adjustment of disputes of the kind under consideration. Thousands of individual cases have been settled during this period and up to the time of the decision in this case, no one has questioned the authority of the employees' representatives to act in this connection. The existence of such authority has always been considered as an integral and essential part of the collective bargaining process as it has developed under federal regulation. We have no hesitancy in saying to the court that we believe that its decision denying the existence of such authority reduces the potency of collective bargaining as an instrumentality of peace in the railroad industry to a lower level than that prevailing in 1920. We feel that the court should be advised that since the announcement of its decision the National Railroad Adjustment Board has virtually ceased to function. . . . This brief is filed with the deep conviction that the whole process of the orderly adjustment of controversies, which is the fruit of railroad labor legislation obtained after long effort on the part of all concerned, is now in serious jeopardy. The potentialities of this case were not fully recognized by us when it was originally before the court.

The Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors of America, and Switchmen's Union of North America united in this statement:

"We are compelled to conclude from this treatment of the problem that the Court proposes to apply a commonlaw standard, designedly suitable to the relatively simple relationship of principal and agent, as the test of the authority of a railway labor organization to handle and settle the host

of grievances which must be expeditiously and effectively disposed of if the Congressional enjoinment 'to avoid any interruption to commerce or to the operation of any carrier engaged therein' is to be accomplished.

We wish respectfully to suggest to the Court that the entertainment of this proposed view could be commended as reasonable only if the problem under consideration were weighed wholly detached from the realities of its environment. If a strait-jacket of legal restrictions is not to shackle the railway labor organizations in the performance of the services expected of them by the Congress and the country at large as outlined in the Railway Labor Act, the mind of the Court must be accurately attuned to the practicalities of the problems faced by those representatives."

To these the Congress of Industrial Organization on its own behalf and for its constituent unions[1] adds:

"The Court holds that such *union settlements* are not permitted, that there must be settlement with the employees involved. It leaves open the question whether an *employee settlement* alone is sufficient or whether a *joint settlement* with employee and union is necessary (Slipsheet 20-21). It concedes that if employee settlements are permitted, then, as to most grievances at least, the union must be allowed to express its views (Slipsheet 20-21 and particularly note 35). We submit that the Act requires union settlements, with the right accorded to the employee to present grievances but not to participate in their disposition.

The disposition of grievances by employee settlements is precluded by the fact that such disposition, without consent of the union, whether of retrospective or prospective matters, introduces the very individual bargaining which Congress intended to eliminate (*supra*). That settlement of grievances is 'bargaining' was clearly recognized by the Court when it referred to the 'power to bargain concerning grievances, that is, to conclude agreements for their settlements'

[1] United Steelworkers of America, United Railroad Workers of America, Amalgamated Clothing Workers of America, United Packinghouse Workers of America, Textile Workers Union of America, International Longshoremen's & Warehousemen's Union, United Office & Professional Workers of America, American Communications Association, American Newspaper Guild, Industrial Union Marine & Shipbuilding Workers of America, United Farm Equipment & Metal Workers of America, International Union of Mine, Mill & Smelter Workers, National Maritime Union of America, United Electrical, Radio & Machine Workers of America, United Automobile, Aircraft, Agricultural Implement Workers of America, Transport Workers Union of America, United Furniture Workers of America, United Transport Service Employees of America, State, County & Municipal Workers of America, Fur & Leather Workers Union.

(Slipsheet 21, note 35). The 'carrier would be free . . . to bargain with each employee for whatever terms its economic power, pitted against his own, might induce him to accept.' "

"We earnestly urge upon the Court . . . that the collective bargaining process has always been viewed by the participants thereto as including the settlement of grievances and, more particularly, that employers and unions have always considered that they had the power to dispose of grievances on a large scale. We call to the attention of the Court the agreement involved in this very case, referred to by the Court in its opinion (Slipsheet 4, Note 5), by which the union and the railroad tried to settle all similar claims then existing. We cannot overestimate the serious consequences of making such agreements ineffective. They are commonly made wherever collective bargaining is established. It will be extremely disturbing to employers and employees alike when employers discover that there is no way, short of settlement with each employee, whereby pending disputes and the possibility of future legal action can be eliminated."

Seldom if ever have the claims of policy been so marshalled on a single side of an issue requiring the interpretation of a statute which, at best, is sufficiently ambiguous to permit these considerations of policy to carry the day. The danger in "adhering" to the original decision is only too clear; it can hardly be lessened by an explanation that extracts meaning from the first opinion.

The results of the opinion of last Term, actual and potential, threatened not only the efficacy of the Railway Labor Act, but generally undermined the basis for all collective bargaining in regard to grievances. It is fair to say that the decision created havoc in the railroad world, for a proper adjustment of industrial relations on the railroads, as the whole course of railroad history shows, is absolutely dependent on appropriate machinery and process of adjustment. The machinery set in motion by the Act was stopped by the opinion. Immediately after the Court's decision of last Term, the two divisions of the Adjustment Board dealing with 94% of the cases under normal circumstances completely shut down. And when they were reopened, they functioned at only a fraction of their normal activity. These Boards are not operating in a vacuum. Their function is to settle by peaceful means employee-employer disputes that would otherwise be settled by a show of power on each side. The Brotherhoods

point to the dangers cumulating in the unadjusted grievances. The Railway Labor Act becomes as ineffective as it was prior to the 1934 amendments; and such a result might well have been anticipated from the destruction of a system that had become customary.

The Court says that it adheres to its previous opinion. Last Term it found that it could not say that the respondents had authorized the union to settle their grievances, and remanded the case for judicial redetermination of the Board's decision. Whatever requirements the Court meant to indicate as sufficient to establish authorization from members of the union to the union the opinion surely conveyed doubt whether the respondents had given authority in a "legally sufficient" way, and encouraged the respondents' claim that they had not authorized their collective agent to settle their grievances. The Court now says that on the record it may be difficult for respondents to prove that they did not authorize the union to represent them. The difficulty becomes apparent as the Court's opinion proceeds. It disclaims that common law agency tests of authority are to be determinative, substitutes "custom and usage," and puts the burden of persuasion on the respondents, having against them the weight of the Board's "expertize," the presumption of regularity, and their own failure to disavow the proceedings before the Board. The hypothetical factors which the Court intimates would defeat respondents' right to sustain this suit are the normal factors in these disputes and are revealed by the record in this case. The way in which these grievances were handled was "the usual manner"; the Adjustment Board exercising its expertness did determine that the union had authority to represent respondents; the respondents did stand by doing nothing while their claims were presented to the Board and determined by it. If the custom of the railroad industry rather than the conventional law of agency is to govern, clearly the expert, centralized Board is the appropriate tribunal for ascertaining whether the authorized bargaining agency is authorized to represent the grievances of its members before the Board, and not the multitudinous courts throughout the country with their varying understanding and varying judgments. The gloss which the Court now puts on its previous opinion in effect recognizes that this is so by the extent

to which it hobbles the right to secure the revision of the Board's determination which it abstractly bestows. Thereby it undermines any justification for the notion that Congress intended to open the courts for a redetermination of the issue of authorization. When Congress was so miserly in granting any jurisdiction to the courts under the Act, it would be surprising if it had authorized review in a field where, as the Court's new opinion makes clear, there was likely to be so little dispute. Yet it is suggested that respondents are entitled to a judicial hearing to determine among other things whether they received individual notice of the proceedings before the Board. But the whole course and current of the railway trade union relationships imply that the interest of the individual member as to issues arising under the collective agreement is entrusted to his chosen representative. To require notice to the particular individuals affected by the specific controversies is to disregard the presupposition of the relationship between union members and their officials and the actualities of practice upon which the Railway Labor Act was based.

If the context of history into which the Railway Labor Act must be placed for a proper interpretation reveals that Congress was bent on creating a system complete in itself for securing peaceful industrial relations in the railroad world, this Court should not import into that system traditional assumptions and rules derived from a scheme of judicially enforceable rights. The new system was devised precisely for the purpose of replacing the ordinary judicial processes in resolving railway labor controversies, except in the very limited instances where Congress specifically retained judicial participation. The whole statute reveals the restricted opportunities for resort to the courts which Congressional policy deemed it appropriate to reserve, even though such restrictions were not formulated with exquisite or explicit precision. By §§ 3 First (p) and 9, 44 Stat. 577, 578, 585, 48 Stat. 1189, 45 U. S. C. §§ 153 and 159, Congress gave courts jurisdiction, thus showing that the subject of judicial remedies was present in the mind of Congress and indicating the strictly defined limits within which they were available. In short, the policy of the legislation, derived from a long and painful experience, is to keep labor controversies on the railroads out of the

courts except in the few specifically defined situations where Congress has put them into the courts. Congress has made a departure in the Railway Labor Act from the normal availability of judicial remedies, and we ought not to read the new law through the spectacles of the old remedies.

A court which has held that under the Railway Labor Act a Board's interpretation of its authority given by a provision of the Act is final and not subject to judicial review denies that another Board under the Act may determine finally whether those who submit controversies on behalf of their members have authority to make such submission so that the Board may settle such disputes, although the determination of the controversy itself is not reviewable unless it involves a money award. See *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297. Railway Labor Act, § 9 Third, 44 Stat. 577, 585, 45 U. S. C. § 159. The answer to such a mutilating construction of the Railway Labor Act was given by this Court in *General Committee of Adjustment* v. *Missouri-Kansas-Texas Railroad Co.*, 320 U. S. 323, 333: "The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate."

SUPREME COURT OF THE UNITED STATES.

No. 160.—October Term, 1944.

Elgin, Joliet and Eastern Railway Company, Petitioner, *vs.* G. W. Burley, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[June 11, 1945.]

Mr. Justice Rutledge delivered the opinion of the Court.

This cause, arising upon an amended complaint,[1] brings for decision novel and important questions concerning the authority of a collective bargaining representative, affecting the operation of the Railway Labor Act of 1934. 48 Stat. 1185, 45 U. S. C. § 151 ff. The ultimate issues are whether such an agent has authority, by virtue of the Act or otherwise, either to compromise and settle accrued monetary claims of ten employees or to submit them for determination by the National Railroad Adjustment Board to the exclusion of their right, after the settlement and after the Board's adverse decision, to assert them in a suit brought for that purpose. The claims are for "penalty damages" for alleged violation of the starting time provisions of a collective agreement, varying from $3,500 to $14,000, and in the aggregate amounting to $65,274.00.[2]

The District Court rendered summary judgment for the carrier, holding that the Board's award was a final adjudication of the claims, within the union's power to seek and the Board's to make, precluding judicial review.[3] The Court of Appeals re-

[1] Amendments were allowed to cure jurisdictional defects found to exist upon an earlier appeal. Alderman *v.* Elgin, Joliet & Eastern Ry. Co., 125 F. 2d 971.

[2] The record sets forth no provision for penalty damages. But the complaint alleges that under the terms of the agreement each of the plaintiffs is entitled to "pay for an additional day, at time and one-half, at the regular daily rate" for each day he was required to work contrary to the agreement's terms.

[3] The court said: "I think that the controversy was submitted to the Board, that it had jurisdiction and that it was decided, and that the plaintiffs were represented there and are bound thereby. . . . I think the ruling of the Adjustment Board was binding upon the plaintiffs as well as upon the defendant, and that it is binding on this court in this proceeding."

versed the judgment, 140 F. 2d 488, holding that the record presented a question of fact whether the union had been authorized by respondents "to negotiate, compromise and settle" the claims. We granted certiorari, 323 U. S. —, in order to resolve the important questions affecting application and operation of the Act.

A statement of the more important facts will put the issues in sharper perspective. The controversy relates to operations in petitioner's so-called "Whiting Yard." Prior to July 24, 1934, respondents, or some of them, were employed by the Standard Oil Company to do private intraplant switching in its Whiting, Indiana, plant. On that date this work was taken over by petitioner. Until then Standard Oil's switching crews began work each day at hours fixed in advance by the management, which varied as plant operations required.

Prior to 1934 petitioner's crews at all yards in Indiana and Illinois began work daily in accordance with starting time provisions contained in Article 6 of a collective agreement made in 1927 between petitioner and the Brotherhood of Railroad Trainmen, governing rules, working conditions and rates of pay of yardmen.

Upon transfer of the Whiting yard switching to petitioner, respondents theretofore employed by Standard Oil became employees of petitioner and members of the Brotherhood. On July 24, 1934, company officials conferred with representatives of the engineers, the firemen and the yardmen concerning terms of employment. The Brotherhood acted for the yardmen. Apparently agreement was reached on all matters except starting time but, as to that, versions of what transpired differ. Respondents and the Brotherhood have maintained that the 1927 agreement, including Article 6, became applicable to them upon the transfer. They say, however, that they assented to a suspension of Article 6 for thirty days from July 27, 1934, to enable the company to work out adjustment to the plant's operations, and accordingly it governed their relation with petitioner from August 26, 1934.

The company has insisted that Article 6 did not become applicable to respondents upon the transfer and that it made no agreement to apply Article 6, other than to follow it as closely as possible, prior to October 31, 1938, when it and the Brotherhood eventually agreed to place Whiting yard crews on fixed starting time, under circumstances to be noted.

Whichever version is true, a long controversy resulted. The carrier continued to follow the former practice, although departures from the schedule were reduced, as it claims, in conformity with the oral undertaking to observe it as far as possible. The work went on without interruption. But numerous complaints on account of departures were made through local officers of the Brotherhood. Time slips were filed by the employees. Frequent negotiations took place. None however resulted in a settlement prior to October 31, 1938.

In this state of affairs, respondents authorized the Brotherhood to file complaint with the National Railroad Adjustment Board for violation of Article 6. This was done on November 23, 1936. The "statement of claim" was signed and filed by Williams, chairman of the general grievance committee. It asserted that the carrier, having "placed the employees under the agreement of the yardmen," had "failed to put into effect the starting time provisions" of Article 6, and denied that violation was justified either because the carrier had agreed with the Engineers to follow the formerly prevailing practice or by the carrier's claim that the work could be done in no other way. The submission was intended to secure compliance. There was no prayer for money damages. Petitioner maintained that Article 6 was not applicable.

The Board, following its customary procedure,[4] docketed the claim as No. 3537, notified the carrier and the union that the case, with many others docketed at the same time, was "assumed to be complete," and forwarded to each copies of the other's submissions. The record does not disclose what followed until nearly two years later.

On October 31, 1938, Williams and Johnson, secretary of the Brotherhood, two of the grievance committee's three members, accepted an offer made by petitioner's president, Rogers, to settle the claim. The settlement took the form of a proposal, made in a letter by Rogers to Williams, to settle some 61 different claims, including "Labor Board Docket No. 3537—Starting time of

[4] The procedure, though informal, consists principally in written statements or "submissions" filed by the parties, which perform the functions of pleading and evidence combined, and oral argument upon the submissions thus made. See Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency (1937) 46 Yale L. J. 567, for a detailed description of the procedure. See also Final Report of the Attorney General's Committee on Administrative Procedure (1941) 185 ff.; Administrative Procedure in Government Agencies, Sen. Doc. No. 10, Part IV, 77th Cong., 1st Sess.

switch engines in Whiting S. O. Yard." Williams and Johnson endorsed acceptance for the Brotherhood and the yardmen on the letter. Because of its importance, pertinent portions are set forth in the margin.[5] On the day the settlement was concluded Rogers and Williams advised the Board of it by letter and jointly requested that the case be withdrawn from the docket, which accordingly was done.

Notwithstanding the settlement, a further dispute arose. In March, 1939, the Brotherhood, through Williams, requested the carrier to furnish a complete list of crews in the Whiting yard started at times other than those fixed by Article 6 from August 27, 1934, to November 15, 1938, when the settlement became effective. The company declined to furnish the list, stating it was at

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[5] The letter was addressed to Williams, as general chairman of the Brotherhood, and dated October 28, 1938. It stated:

"Since my letter of August 18th in which I tentatively proposed settlement of certain matters of grievance we have had further correspondence and conferences which have modified our decision in some cases. Therefore, in order that the whole matter be placed in concrete form I am outlining below our proposals to settle all of the cases except as otherwise specified.

. . . . . .

"Case No. 5—Labor Board Docket # 3537—Starting time of switch engines in Whiting S. O. Yard.

"Settled by agreement that *the starting times for a ninety day trial period* commencing November 15th, 1938, *shall be the times provided for in Article 6* of the Yardmen's Agreement *instead of the starting times heretofore agreed upon and now being followed.* If at the end of the ninety day trial period the Railway Company or its employees claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in satisfaction to our employees and to the industry served, then representatives of the Railway Company and representatives of the Yardmen, and representatives of the Engineers and representatives of the Firemen *will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry.*

. . . . . .

"We have by this letter given you a complete resume of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employees whom you represent and have proposed in this letter a very liberal disposition of all the cases involved. The settlements proposed are predicated on *a complete settlement and withdrawal of all cases now pending* either before the board, *or under discussion with this office except Case No. 4*, which it is understood will be left to a decision by the National Railroad Adjustment Board, *and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement.* [Emphasis added]

"Yours truly,
"S. M. Rogers, President.

"Accepted for the Yardmen: Oct. 31, 1938.
"C. H. Williams, General Chairman, B. of R. T.
"S. F. Johnson, Secretary, B. of R. T."

a loss to understand the reason for the request in view of the settlement.

The upshot of the dispute was the filing of another claim with the Board, Docket No. 7324, on May 18, 1939, by Williams, acting for the Brotherhood. This submission was "for one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article No. 6 of the Yardmen's Agreement . . . effective January 1, 1927, and applicable to Whiting (Standard Oil Company) Yardmen, July 27, 1934, from dates of August 27, 1934, until November 14, 1938, inclusive."

The submission not only maintained the applicability of Article 6 and accrual of the individual claims asserted. It also maintained that the settlement of October 31, 1938, was effective only to fix the starting time for the future and had no effect to waive or determine individual claims for penalty damages accrued prior to the settlement.[6]

The carrier's submission reiterated its position in Case No. 3537. It also relied upon the settlement as precluding later assertion of any claim, individual or collective, based upon occurrences prior to the date of the settlement.

The matter went to decision by the Board. Under the procedure prescribed in case of deadlock, cf. § 3 First (l), a referee was called in. The award was made by the First Division on September 6, 1940. It sustained the Board's jurisdiction,[7] found that "the parties to said dispute were given due notice of hearing

[6] Cf. note 5. The submission stated: "There were no agreements reached whereby payment for violation of Article No. 6 of the Yardmen's Agreement would be waived as a result of withdrawal of Labor Board Docket No. 3537. *In fact that case held no claims for payment for time. It was simply a case to settle* the dispute as to *the carrier's right to force the yard crews* in the Whiting yard *to work at times other than the fixed starting time* provided for in Article 6. . . .

"As stated before, Case No. 5—Labor Board Docket No. 3537 *contained no claim for pay* to Whiting Yardmen. *Consequently it was not a question before the Management and the Committee in the* starting time *negotiation* and claim cannot be made that a waiver was made on a matter which was not negotiated."

The submission also denied that oral agreements relating to starting time, claimed by the carrier to have been made at the time of the transfer in 1934, could be effective "to invalidate the prescribed written rule of Article 6." Williams however did not question the validity of the verbal agreement, as he maintained, for the thirty day suspension.

[7] The submissions in no way challenged the jurisdiction of the Board or of the Division.

thereon," and held that "the evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28, 1938, accepted by employees October 31, 1938." Accordingly the claim was "denied per findings."

Thereafter, on November 19, 1940, the present suit was instituted. As has been noted, the case comes here after a summary judgment rendered on the carrier's motion, supported by the affidavit of its vice president. This in effect set up the compromise agreement and the award in Case No. 7324 as bases for the judgment sought.

The range and precise nature of the issues may be summarized best perhaps as they were shaped upon respondents' opposition to the carrier's motion. They denied that either Williams or the union had authority to release their individual claims or to submit them for decision by the Board. They relied upon provisions of the Brotherhood's constitution and rules,[8] of which the carrier was alleged to have knowledge, as forbidding union officials to release individual claims or to submit them to the Board "without specific authority to do so granted by the individual members themselves"; and denied that such authority in either respect had been given.

The validity and the conclusive effect of the award were challenged also upon other grounds, among them that respondents individually received no notice of the submission or the hearing until after the award was made; that since the award denied a claim for money damages, it was within the exception of Section 3 First (m), which provides that "the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award," and therefore did not preclude this suit; and that the Act, if construed to make the award conclusive, would violate the Fifth Amendment's due process provision by denying judicial review to defeated employees, though allowing it to defeated employers. Cf. § 3 First (p), (q); *Washington Terminal Co.* v. *Boswell,* 124 F. 2d 235, affirmed by an equally divided Court, 319 U. S. 732.

Finally respondents suggested most sweepingly that the Board

[8] See Part III. The provisions regulate the union's internal procedure in relation to making changes in a "general or system wage schedule or agreement," Rule No. 3, and that to be followed when the local chairman or grievance committee fails "satisfactorily to adjust any grievance referred to it." Rule No. 7. The latter includes a provision that "a general grievance committee may authorize their chairman to handle all grievances received from local lodges." See also note 40.

may act "merely as an arbitrator," with the result that "any decisions thereunder are void because it passes on matters and bases its decision and its opinion on law and fact which is contrary to public policy." The prayer was that the court overrule the carrier's motion for summary judgment and, in doing so, determine that the release was not effective; the award was not a final adjudication of the claims; and the award was void for lack of jurisdiction of the parties or the subject matter or "because said Act under which award was entered is unconstitutional."

The District Court's judgment rested squarely on the conclusive effect of the award in Docket No. 7324. It did not indicate whether it regarded the Brotherhood's authority to submit the claims and appear for the employees as derived from the statute or, apart from the statute, as a matter of law upon the particular facts. But it must be taken to have held that, upon the pleadings and the affidavits, no genuine issue of material fact was presented, Fed. Rules Civ. Proc., Rule 56(c), and therefore that it was immaterial if, as alleged, respondents had not individually given the Brotherhood or Williams specific authority to submit their claims for decision or represent them in the hearings.

The Court of Appeals, however, made no reference to the issues concerning the award and its effect upon the claims. But its judgment must be taken to have determined implicitly that none of petitioner's contentions in these respects is valid.

The issues are not merely, as the Court of Appeals assumed, whether the Brotherhood had authority to compromise and settle the claims by agreement with the carrier and whether on the record this presents a question of fact. For petitioner insists, and the District Court held, that the award of the Board was validly made, and is final, precluding judicial review. We do not reach the questions of finality, which turn upon construction of the statutory provisions and their constitutional validity as construed.[9] Those questions should not be determined unless the award was validly made, which presents, in our opinion, the crucial question. Respondents attack the validity and legal effectiveness of the award in three ways. Two strike at its validity on narrow grounds. Respondents say the Brotherhood had no power to submit the dispute for decision by the Board without authority

[9] Cf. § 3 First (m), (o), (p), (q).

given by each of them individually and that no such authority was given. They also maintain that they were entitled to have notice individually of the proceedings before the Board and none was given.

The third and most sweeping contention undercuts all other issues concerning the award's effects, whether for validity or for finality. In substance it is that the award, when rendered, amounts to nothing more than an advisory opinion. The contention, founded upon language of the opinion in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, regards the Act's entire scheme for the settlement of grievances as wholly conciliatory in character, involving no element of legal effectiveness, with the consequence that the parties are entirely free to accept or ignore the Board's decision.

At the outset we put aside this broadest contention as inconsistent with the Act's terms, purposes and legislative history.[10] The *Moore* case involved no question concerning the validity or the legal effectiveness of an award when rendered.[11] Nor did it purport to determine that the Act creates no legal obligations through an award or otherwise. Apart from the affirmance by equal division in *Washington Terminal Co.* v. *Boswell*, *supra*, both prior and later decisions here are wholly inconsistent with such a view of its effects. Cf. *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515; *Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U. S. 548;[12] *Switchmen's Union* v. *National Mediation Board*,

[10] Cf. Part. I.

[11] It was held that nothing in the Act "purports to take away from the courts the jurisdiction to determine a controversy over wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court," 312 U. S. at 634; and therefore the employee's suit could be maintained against the carrier without prior resort to the Adjustment Board. Among the reasons assigned was that the machinery provided for settling disputes was not "based on a philosophy of legal compulsion" but created "a system for peaceful adjustment and mediation voluntary in its nature."

The problem presented was whether the Adjustment Board procedure either was exclusive or was an essential preliminary to judicial proceedings within the doctrine of primary jurisdiction. These were questions not entirely determinable by the criterion of whether the procedure is wholly advisory or conciliatory in character. For, conceivably, Congress might have made the taking of the Board's merely advisory opinion a condition precedent to asking for judicial relief; and, conversely, allowing that relief without prior resort to the Board does not necessarily make the Board's action, when taken, merely advisory.

[12] Thus, one of the statute's primary commands, judicially enforceable, is found in the repeated declaration of a duty upon all parties to a dispute to negotiate for its settlement. See note 26; Virginian Ry. Co. v. System

320 U. S. 297; *General Committee* v. *M-K-T R. Co.*, 320 U. S. 323; *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338.

I.

The difference between disputes over grievances and disputes concerning the making of collective agreements is traditional in railway labor affairs. It has assumed large importance in the Railway Labor Act of 1934, substantively and procedurally.[13] It divides the jurisdiction and functions of the Adjustment Board from those of the Mediation Board, giving them their distinct characters. It also affects the parts to be played by the collective agent and the represented employees, first in negotiations for settlement in conference and later in the quite different procedures which the Act creates for disposing of the two types of dispute. Cf. §§ 3, 4.

The statute first marks the distinction in Section 2, which states as among the Act's five general purposes: "(d) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (e) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." The two sorts of dispute are sharply distinguished,[14] though there are points of common treatment. Nevertheless, it is clear from the Act itself, from the history of railway labor disputes and from the legislative history of the various statutes which have dealt with them,[15] that Congress has drawn major lines of difference between the two classes of controversy.

Federation, 309 U. S. 313; cf. Switchmen's Union v. National Mediation Board, 320 U. S. 297, 300, 320; General Committee v. M-K-T R. Co., 320 U. S. 323, 331, 334. This duty is not merely preliminary. Final exhaustion of the possibility of agreement is required in order to [illegible] Virginian Ry. Co. v. System Federation, supra, at 548, 550; Brotherhood v. Toledo, P. & W. R. Co., 321 U. S. 50, 56 ff. At successive stages of the statutory procedure other duties are imposed. Cf. §§ 3 First (i), (j), 10.

13 Cf. the references cited in notes 9 and 10.

14 Cf. text Part II at note 39; also Virginian Ry. Co. v. National Labor Relations Board, 147 F. 2d 68, 72, 73.

15 See the references cited in note 9. Hearings before Committee on Interstate Commerce on H. R. 7650, 73d Cong., 2d Sess.; Hearings before Committee on Interstate Commerce on S. 1629, 73d Cong., 2d Sess.; Pennsylvania R. Co. v. Railroad Labor Board, 261 U. S. 72; Pennsylvania System Federation v. Pennsylvania R. Co., 267 U. S. 203; Texas & N. O. R. Co. v. Brotherhood, 281 U. S. 548; Virginian Ry. Co. v. System Federation, 300 U. S. 515.

The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e. g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

In general the difference is between what are regarded traditionally as the major and the minor disputes of the railway labor world.[16] The former present the large issues about which strikes ordinarily arise with the consequent interruptions of traffic the Act sought to avoid. Because they more often involve those consequences and because they seek to create rather than to enforce contractual rights, they have been left for settlement entirely to the processes of noncompulsory adjustment.

The so-called minor disputes, on the other hand, involving grievances, affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally in the course of an employment. They represent specific maladjustments of a detailed or individual quality. They seldom

[16] Cf. the references cited in note 4. Commissioner (also Coordinator) Eastman, who very largely drafted the 1934 amendments, said in testifying at the House Committee hearings concerning them:

"Please note that disputes concerning changes in rates of pay, rules, or working conditions may not be so referred [to the National Adjustment Board], but are to be handled, when unadjusted, through the process of mediation. The national adjustment board is to handle only the minor cases growing out of grievances or out of the interpretation or application of agreements." Hearings before Committee on Interstate Commerce on H. R. 7650, 73 Cong., 2d Sess., 47; cf. also pp. 49, 51, 59, 62. And see the testimony of Harrison, a principal union proponent, before the House Committee, *id.*, at 80-83; and before the Senate Committee, Hearings before Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess., 33, 35.

produce strikes, though in exaggerated instances they may do so.[17] Because of their comparatively minor character and the general improbability of their causing interruption of peaceful relations and of traffic, the 1934 Act sets them apart from the major disputes and provides for very different treatment.

Broadly, the statute as amended marks out two distinct routes for settlement of the two classes of dispute, respectively, each consisting of three stages. The Act treats the two types of dispute alike in requiring negotiation as the first step toward settlement and therefore in contemplating voluntary action for both at this stage, in the sense that agreement is sought and cannot be compelled. To induce agreement, however, the duty to negotiate is imposed for both grievances and major disputes.[18]

Beyond the initial stages of negotiation and conference, however, the procedures diverge. "Major disputes" go first to mediation under the auspices of the National Mediation Board; if that fails, then to acceptance or rejection of arbitration, cf. § 7; *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50; and finally to possible presidential intervention to secure adjustment. § 10. For their settlement the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. § 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration.

The course prescribed for the settlement of grievances is very different beyond the initial stage. Thereafter the Act does not leave the parties wholly free, at their own will, to agree or not to agree. On the contrary, one of the main purposes of the 1934 amendments was to provide a more effective process of settlement.[19]

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[17] Cf. the testimony of Eastman and Harrison, cited in note 16.

[18] Cf. note 12; also notes 26, 27, and text *infra*. The obligation is not partial. In plain terms the duty is laid on carrier and employees alike, together with their representatives; and in equally plain terms it applies to all disputes covered by the Act, whether major or minor.

[19] H. Rep. No. 1944 on H. R. 9861, 73d Cong., 2d Sess., 3; S. Rep. No. 1065 on S. 3266, 73d Cong., 2d Sess., 1, 2.

Prior to 1934 the parties were free at all times to go to court to settle these disputes. Notwithstanding the contrary intent of the 1926 Act, each also had the power, if not the right, to defeat the intended settlement of grievances by declining to join in creating the local boards of adjustment provided for by that Act. They exercised this power to the limit. Deadlock became the common practice, making decision impossible. The result was a complete breakdown in the practical working of the machinery. Grievances accumulated and stagnated until the mass assumed the proportions of a major dispute. Several organizations took strike ballots and thus threatened to interrupt traffic, a factor which among others induced the Coordinator of Transportation to become the principal author and advocate of the amendments. The sponsor in the House insisted that Congress act upon them before adjournment for fear that if no action were taken a railroad crisis might take place.[20] The old Mediation Board was helpless.[21] To break this log jam, and at the same time to get grievances out of the way of the settling of major disputes through the functioning of the Mediation Board, the Adjustment Board was created and given power to decide them.[22]

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[20] Cf. 78 Cong. Rec. 12553. Coordinator Eastman referred, in his testimony, to four recent strike votes occasioned by deadlock. Hearings before Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess., 17.

[21] The Chairman told the Senate Committee: "The provision in the present act [1926] for adjustment boards is in practice about as near a fool provision as anything could possibly be. I mean this—that on the face of it they shall, by agreement, do so and so. Well, you can do pretty nearly anything by agreement, but how can you get them to agree?" Hearings before Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess., 137.

[22] See, for a general view of the circumstances inducing enactment of the 1934 Amendments, the references cited above in notes 4, 15, 16, 19. The report of the House Committee in charge of the bill stated:

"Many thousands of these disputes have been considered by boards established under the Railway Labor Act; but the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked. These unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce in order to secure an adjustment. This has made it necessary for the President of the United States to intervene and establish an emergency board to investigate the controversies. This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service. This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes may be submitted if they shall not have been adjusted in conference between the parties." H. Rep. No. 1944, 73d Cong., 2d Sess., 3. Cf. also the testimony of Coordinator Eastman, Hearings before Committee on Interstate Commerce on H. R. 7650, 73d Cong., 2d Sess., 49.

The procedure adopted is not one of mediation and conciliation only, like that provided for major disputes under the auspices of the Mediation Board. Another tribunal of very different character is established with "jurisdiction" to determine grievances and make awards concerning them. Each party to the dispute may submit it for decision, whether or not the other is willing, provided he has himself discharged the initial duty of negotiation.[23] § 3 First (i). Rights of notice, hearing, and participation or representation are given. § 3 First (j). In some instances judicial review and enforcement of awards are expressly provided or are contemplated. § 3 First (p); cf. § 3 First (m). When this is not done, the Act purports to make the Board's decisions "final and binding." § 3 First (m).

The procedure is in terms and purpose very different from the preexisting system of local boards. That system was in fact and effect nothing more than one for what respondents call "voluntary arbitration." No dispute could be settled unless submitted by agreement of all parties. When one was submitted, deadlock was common and there was no way of escape. The Adjustment Board was created to remove the settlement of grievances from this stagnating process and bring them within a general and inclusive plan of decision.[24] The aim was not to dispense with agreement. It was to add decision where agreement fails and thus to safeguard the public as well as private interests against the harmful effects of the preexisting scheme.

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[23] Section 3 First (i) expressly conditions the right to move from negotiation into proceedings before the Adjustment Board upon "failing to reach an adjustment in this manner," i. e., by negotiation.

[24] See the testimony of Coordinator Eastman and Mr. Harrison, cited in note 16. The latter stated, at the Senate Committee hearings, pp. 33, 35:

"... [T]his has been a question for the last 14 years as to what kind of boards we are going to have to settle our grievances. ... We have always sought national boards; the railroads ... have sought the system boards, regional boards. ... Most of the boards ... under the present law have deadlocked on any number of cases. As a result of that there was fast growing up in our industry a serious condition that might very well develop into substantial interruption of interstate commerce. ... These *railway labor organizations have always opposed compulsory determination of their controversies.* We have lived a long time and got a lot of experience, and we know that these minor cases that develop out of contracts that we make freely, and ... *we are now ready to concede that we can risk having our grievances go to a board and get them determined, and that is a contribution that these organizations are willing to make;* ... if we are going to get a hodgepodge arrangement by law, then we don't want to give up that right, because we only give up the right because we feel that we will get a measure of justice by this machinery that we suggest here." (Emphasis added.)

II.

The collective agent's power to act in the various stages of the statutory procedures is part of those procedures and necessarily is related to them in function, scope and purpose.

The statute itself vests exclusive authority to negotiate and to conclude agreements concerning major disputes in the duly selected collective agent. Cf. *Virginian Ry. Co.* v. *System Federation, supra.*[28] Since the entire statutory procedure for settling major disputes is aimed only at securing agreement and not decision, unless the parties agree to arbitration, this exclusive authority includes representation of the employees not only in the stage of conference, but also in the later ones of mediation, arbitration and conciliation.

Whether or not the agent's exclusive power extends also to the settlement of grievances, in conference or in proceedings before the Board, presents more difficult questions. The statute does not expressly so declare. Nor does it explicitly exclude these functions. The questions therefore are to be determined by implication from the pertinent provisions. These are the ones relating to rights of participation in negotiations for settlement and in proceedings before the Board. They are in part identical with the provisions relating to major disputes, but not entirely so; and the differences are highly material.

The questions of power to bargain concerning grievances, that is, to conclude agreements for their settlement, and to represent aggrieved employees in proceedings before the Board are not identical. But they obviously are closely related in the statutory scheme and in fact. If the collective agent has exclusive power to settle grievances by agreement, a strong inference, though not necessarily conclusive, would follow for its exclusive power to represent the aggrieved employee before the Board. The converse also would be true. Accordingly it will be convenient to consider the two questions together.

The primary provisions affecting the duty to treat are found in Section 2 First and Second, imposing the duty generally as to all disputes, both major and minor, and Sections 2 Sixth and 3 First (i), together with the proviso to Section 2 Fourth, which apply specially to grievances. These sections in material part

[28] Cf. also Medo Photo Supply Corp. v. National Labor Relations Board, 321 U. S. 678; J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332.

are set forth in the margin,[26] except the proviso which is as follows: "Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting *an employee, individually,* or local representatives of employees *from conferring* with management during working hours *without loss of time,* or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."[27] (Emphasis added.)

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[26] By Section 2 First, "*It shall be the duty of* all carriers, their officers, agents, and *employees* to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and *to settle all disputes,* whether arising out of *the application* of such agreements or otherwise, in order to avoid any interruption to commerce. . . ." By Section 2 Second, "*All* disputes between a carrier or carriers and its or their employees *shall be considered, and, if possible, decided,* with all expedition, in conference *between representatives designated and authorized* so to confer, respectively, by the carrier or carriers and *by the employees thereof interested in the dispute.*" (Emphasis added.) These are the basic sections creating the duty, applicable to all disputes, major or minor, and to carriers and employees alike.

Other provisions affecting the general duty to treat are those of Section 2 Third, that "representatives, *for the purposes of this Act,* shall be designated by the respective parties without interference" by the other and "need not be persons in the employ of the carrier"; of Section 2 Fourth, that "the majority of any craft or class of employees shall have the right to determine who shall be *the representative of the craft or class for the purposes of this Act*"; and of Section 2 Eighth that "*every* carrier shall notify its employees by printed notices . . . that *all disputes* between the carrier and its employees *will be handled in accordance with the requirements of this Act.*" (Emphasis added.)

Section 2 Sixth applies specially to grievances, as does Section 3 First (i). The former provides: "In case of a dispute between a carrier or carriers and its or their employees, *arising out of grievances or out of the interpretation or application of agreements* concerning rates of pay, rules, or working conditions, *it shall be the duty of the designated representative* or representatives of such carrier or carriers and *of such employees,* within ten days after the receipt of notice of a desire on the part of either party *to confer* in respect to such dispute, to specify a time and place. . . ." Section 3 First (i) is as follows: "The disputes between *an employee* or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, *shall be handled in the usual manner up to and including* the chief operating officer of the carrier designated to handle such disputes; but, *failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board* with a full statement of the facts and all supporting data bearing upon the disputes." (Emphasis added.)

[27] Section 2 Eighth makes this proviso part of the contract of employment between the carrier and each employee, and Section 2 Tenth makes it a misdemeanor for the carrier to refuse to observe it. Section 2 Eighth incorporates the provisions of Sections 2 Third, Fourth and Fifth in each employee's contract of employment. Section 2 Tenth makes it a misdemeanor for the carrier to fail or refuse to comply with the terms of Sections 2 Third, Fourth, Fifth, Seventh and Eighth.

Relating to participation in the Board's proceedings, in addition to the concluding sentence of Section 3 First (i), see note 26, is Section 3 First (j), as follows: "Parties may be heard either *in person*, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings *to the employee* or employees and the carrier or carriers involved in any dispute submitted to them." (Emphasis added)

Petitioner urges that, notwithstanding the proviso and Section 3 First (j), the effect of the provisions taken as a whole is to make the collective agent the employees' exclusive representative for the settlement of *all* disputes, both major and minor, and of the latter "whether arising out of the application of such [collective] agreements or otherwise." The argument rests primarily upon Sections 2 First, Second, Third, Fourth, Sixth, and 3 First (i). It emphasizes the carrier's duty to treat with the collective representative, as reinforced by Sections 2 Eighth and Tenth.[28]

Petitioner does not squarely deny that the aggrieved employee may confer with the carrier's local officials either personally or through *local* union representatives in accordance with the proviso to Section 2 Fourth. But this right, if it exists, is regarded apparently as at most one to be heard, since in petitioner's view the power to make settlement by agreement is vested exclusively in the collective agent. Cf. §§ 2 Sixth and 3 First (i).

The collective agent, as the carrier conceives the statute, is the "representative[s], designated and authorized to confer" within the meaning of Section 2 Second, without distinction between major and minor disputes. It is likewise the "representative, for the purposes of this Act," again without distinction between the two types of dispute, in the selection of which by "the respective parties" Section 2 Third forbids the other to interfere. It is also "the designated representative" of the employees with whom, by Section 2 Sixth, the carrier is required to treat concerning grievances in conference, a provision considered to carry over into Section 3 First (i). The latter requires that disputes over grievances "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes."

[28] See note 27.

In accordance with this view "either party," within the further provision of Section 3 First (i) authorizing reference of the dispute to the Adjustment Board "by petition of the parties or by either party," refers to the carrier or the collective agent, not to the aggrieved employee acting otherwise than by the collective agent. Hence, "parties" as used in Section 2 First (j) is given similar meaning. Consequently the collective agent also has exclusive power to submit the dispute to the Board and to represent aggrieved employees before it.

Petitioner's view has been adopted, apparently, in the general practice, if not the formally declared policy of the Adjustment Board. And this, it seems, has been due to the position taken consistently by the employees' representatives on the Board, over the opposition of carrier representatives.[29] The unions, apparently, like petitioner in this case, interpret the Act as not contemplating two distinct systems for the settlement of disputes, one wholly collective for major disputes, the other wholly individual for minor ones. In this view the collective agent becomes a party to the collective agreement by making it and its interest as representative of the collective interest does not cease when that function ends. It remains a party to the agreement, as such representative, after it is made; and consequently, in that capacity and for the protection of the collective interest, is concerned with the manner in which the agreement may be interpreted and applied.

Accordingly, petitioner urges that the statute, both by its terms and by its purpose, confers upon the collective agent the same exclusive power to deal with grievances, whether by negotiation and contract, or by presentation to the Board when agreement fails, as is given with respect to major disputes. And the aggrieved employee's rights of individual action are limited to rights of hearing before the union and possibly also by the carrier.

We think that such a view of the statute's effects, in so far as it would deprive the aggrieved employee of effective voice in any settlement and of individual hearing before the Board, would be contrary to the clear import of its provisions and to its policy.

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[29] Cf. Administrative Procedure in Government Agencies, Sen. Doc. 10, Part IV, 77th Cong., 1st Sess., 7.

It would be difficult to believe that Congress intended, by the 1934 amendments, to submerge wholly the individual and minority interests, with all power to act concerning them, in the collective interest and agency, not only in forming the contracts which govern their employment relation,[30] but also in giving effect to them and to all other incidents of that relation. Acceptance of such a view would require the clearest expression of purpose. For this would mean that Congress had nullified all preexisting rights of workers to act in relation to their employment, including perhaps even the fundamental right to consult with one's employer, except as the collective agent might permit. Apart from questions of validity, the conclusion that Congress intended such consequences could be accepted only if it were clear that no other construction would achieve the statutory aims.[31]

The Act's provisions do not require such a construction. On the contrary they appear expressly to preclude it. The proviso to Section 2 Fourth in terms reserves the right of "an employee *individually*" to confer with management; and Section 3 First (j) not only requires the Board to give "due notice of all hearings *to the employee* . . . involved in any dispute submitted . . . ," but provides for "parties" to be heard "either *in person*, by counsel, or by other representatives, as they may respectively elect."

These provisions would be inapposite if the collective agent, normally a labor union and an unincorporated association, exclusively were contemplated. Such organizations do not and cannot appear and be heard "in person." Nor would the provision for notice "to *the employee* . . . involved in any dispute" be either appropriate or necessary. If only the collective representative were given rights of submission, notice, appearance

[30] Cf. Steele v. Louisville & N. R. Co., 323 U. S. 192; Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U. S. 210; Wallace Corp. v. National Labor Relations Board, 323 U. S. 248.

[31] In this connection it is important to recall that the Act does not contemplate the existence of closed shops, to the extent at any rate that the carrier is forbidden to make such agreements. Cf. § 2 Fourth; 78 Cong. Rec. 12,402; 40 Op. Atty. Gen., No. 59 (Dec. 29, 1942). Accordingly the interests of unorganized workers and members of minority unions are concerned in the solution. These are not always adverse to the interests of the majority or of the designated union. But they may be so or even hostile. Cf. the authorities cited in note 30. To regard the statute as so completely depriving persons thus situated of voice in affairs affecting their very means of livelihood would raise very serious questions.

and representation, language more aptly designed so to limit those rights was readily available and was essential for the purpose.

This conclusion accords fully with the terms of the proviso to Section 2 Fourth. It appears to be intended as a qualification, in respect to loss of time and free transportation, of the section's preceding prohibitions against the carrier's giving financial and other aid to labor organizations and to employees in an effort to influence their union affiliations.[32] However, the language clearly contemplates also that the individual employee's right to confer with the management about his own grievance is preserved. There is some indication in the legislative history to this effect.[33] The right is so fundamental that we do not believe the purpose was to destroy it. Cf. 40 Op. Atty. Gen., No. 59, pp. 5, 6 (Dec. 29, 1942); *Hughes Tool Co.* v. *National Labor Relations Board*, 147 F. 2d 69.

Rights of conference are not identical with rights of settlement. But the purpose of conference and the duty to treat is to bring about agreement. The right and the obligation to share in the negotiations are relevant to their aim. Conceivably the statute might confer the right to participate in the negotiations, that is, to be heard before any agreement is concluded, either upon the collective agent or upon the aggrieved employee or employees, at the same time conferring upon the other the final voice in determining the terms of the settlement. This is, in effect, the position taken by each of the parties in this case. But they differ concerning where the final say has been vested. Petitioner maintains it has been given to the union. Respondents say it has been left with them.

In the view we take the Act guarantees to the aggrieved employee more than merely the right to be heard by the union and the carrier. We cannot say that the terms of the proviso to Section 2 Fourth and of Section 3 First (j) are so limited. Moreover, Section 3 First (p) expressly states that the statutory

[32] This undoubtedly was the primary object. The language in the concluding clause, "while engaged in the business of a labor organization," applies literally only to employees travelling upon union business, and has no apparent application to the preceding provision relating to the individual employee's right to confer with management.

[33] Hearings before Committee on Interstate Commerce on H. R. 7650, 73d Cong., 2d Sess., 36, 44, 89.

suit to enforce an award in favor of an aggrieved employee may be brought by "the petitioner," presumably the collective agent, or by the employee. All of these provisions contemplate effective participation in the statutory procedures by the aggrieved employee.

His rights, to share in the negotiations, to be heard before the Board, to have notice, and to bring the enforcement suit, would become rights more of shadow than of substance if the union, by coming to agreement with the carrier, could foreclose his claim altogether at the threshold of the statutory procedure. This would be true in any case where the employee's ideas of appropriate settlement might differ from the union's. But the drastic effects in curtailment of his preexisting rights to act in such matters for his own protection would be most obvious in two types of cases: one, where the grievance arises from incidents of the employment not covered by a collective agreement, in which presumably the collective interest would be affected only remotely, if at all; the other, where the interest of an employee not a member of the union and the collective interest, or that of the union itself, are opposed or hostile. That the statute does not purport to discriminate between these and other cases furnishes strong support for believing its purpose was not to vest final and exclusive power of settlement in the collective agent.[34]

We need not determine in this case whether Congress intended to leave the settlement of grievances altogether to the individual workers, excluding the collective agent entirely except as they may specifically authorize it to act for them, or intended it also to have voice in the settlement as representative of the collective interest. Cf. *Matter of Hughes Tool Company*, 56 N. L. R. B. 981, modified and enforced, *Hughes Tool Co.* v. *National Labor Relations Board, supra.* The statute does not expressly exclude grievances from the collective agent's duty to treat or power to submit to the Board. Both collective and individual interests may be concerned in the settlement where, as in this case, the dispute concerns all members alike, and settlement hangs exclusively upon a single common issue or cause of dispute arising from the terms

[34] Cf. note 37 and text. It is to be doubted that Congress by the generally inclusive language used concerning grievances intended, for instance, to give the collective agent exclusive power to settle a grievance arising independently of the collective agreement, affecting only nonunion men to whose claim the union and the majority were hostile.

of a collective agreement.[35] Those interests combine in almost infinite variety of relative importance in relation to particular grievances, from situations in which the two are hostile or in which they bear little or no relation of substance to each other and opposed to others in which they are identified.[36]

Congress made no effort to deal specifically with these variations.[37] But whether or not the collective agent has rights, independently of the aggrieved employee's authorization, to act as representative of the collective interest and for its protection in any settlement, whether by agreement or in proceedings before the Board, an award cannot be effective as against the aggrieved employee unless he is represented individually in the proceedings in accordance with the rights of notice and appearance or representation given to him by Section 3 First (j). Those rights are separate and distinct from any the collective agent may have to represent the collective interest. For an award to affect the employee's rights, therefore, more must be shown than that the collective agent appeared and purported to act for him. It must appear

[35] But whether or not the carrier's violation affects all the members of the group immediately and alike, so as to create a present basis for claims by each, the violation, though resulting from misinterpretation, would constitute a present threat to the similar rights of all covered by the contract. Cf. Hughes Tool Co. v. National Labor Relations Board, *supra*, 72, 74; 40 Op. Atty. Gen., No. 59, pp. 4, 5, (Dec. 29, 1942).

To leave settlements in such cases ultimately to the several choices of the members, each according to his own desire without regard to the effect upon the collective interest, would mean that each affected worker would have the right to choose his own terms and to determine the meaning and effect of the collective agreement for himself. Necessarily, the carrier would be free to join with him in doing so and thus to bargain with each employee for whatever terms its economic power, pitted against his own, might induce him to accept. The result necessarily would be to make the agreement effective, not to all alike, but according to whatever varied interpretations individual workers, from equally varied motivations, might be willing to accept. To give the collective agent power to make the agreement, but exclude it from any voice whatever in its interpretation would go far toward destroying its uniform application.

[36] Depending upon the substantive character of the claim, its foundation in a collective agreement or otherwise, its intrinsically substantial or insubstantial nature, the number of employees affected, the length of time it remains unsettled, the number of claims allowed so to run, or perhaps other factors, the grievance may be a matter of large moment to the group as a whole or of little or no concern to it and, it may be, of either identical or converse importance to the individual or individuals directly affected.

[37] Congress was concerned primarily with differences between the carrier and the employees, not with differences among the latter or between them, or some of them, and the collective agent. The statute therefore was not drawn with an eye levelled to these problems, except as to choice of representatives, cf. § 2 Fourth; § 2 Ninth; and note 34.

that in some legally sufficient way he authorized it to act in his behalf.[38]

Petitioner's contrary view, as has been indicated, regards the settlement of grievances as part of the collective bargaining power, indistinguishable from the making of collective agreements. The assumption ignores the major difference which the Act has drawn between those functions, both in defining them and in the modes provided for settlement.

To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently of the power to deal with grievances, as part of the power to contract "concerning rates of pay, rules, or working conditions." It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a pre-existing collective agreement. For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place.

But it does not cover changing them with retroactive effects upon accrued rights or claims. For it is precisely the difference between making settlements effective only for the future and making them effective retroactively to conclude rights claimed as having already accrued which marks the statutory boundary between collective bargaining and the settlement of grievances. The latter by explicit definition includes the "interpretation or application" of existing agreements. To regard this as part of the collective bargaining power identifies it with making new agreements having only prospective operation; and by so doing obliterates the statute's basic distinction between those functions.[39]

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[38] Authority might be conferred in whatever ways would be sufficient according to generally accepted or "common law" rules for the creation of an agency, as conceivably by specific authorization given orally or in writing to settle each grievance, by general authority given to settle such grievances as might arise, or by assenting to such authority by becoming a member of a union and thereby accepting a provision in its constitution or rules authorizing it to make such settlements.

[39] The distinction holds true although "interpretation or application" may look to the future as well as the past, as it often does. It goes to the source of the right asserted, whether in an antecedent agreement or only to one presently sought. The difference is important for other issues as well as those presently involved, e. g., application of statutes of limitations.

The distinction is not to be ignored or wiped out merely because a particular dispute or agreement may look both to the past and to the future. The special procedure for settling grievances was created because it was intended they should be disposed of differently from disputes over "rates

The Brotherhood had power, therefore, as collective agent to make an agreement with the carrier, effective for the future only, to settle the question of starting time, and that power was derived from the Act itself. In dealing within its scope, the carrier was not required to look further than the Act's provisions to ascertain the union's authority. But it does not follow, as petitioner assumes, that it had the same right to deal with the union concerning the past. That aspect of the dispute was not part of the collective agent's exclusive statutory authority.

If to exclude it severs what otherwise might be considered organic, the severance clearly is one which Congress could make and is one we think it has made, by its definition of grievances and by the provisions for individual participation in their settlement. If, moreover, as petitioner urges, this may make the settlement less convenient than if power to deal with grievances were vested exclusively in the collective agent, that consequence may be admitted. But it cannot outweigh the considerations of equal or greater force which we think Congress has taken into account in preserving the individual workman's right to have a voice amounting to more than mere protest in the settlement of claims arising out of his employment.

From the fact that the Brotherhood occupied the position of collective bargaining agent and as such had power to deal for the future, therefore, petitioner was not entitled to make any assumption concerning its authority to settle the claims accrued for the past or to represent the claimants exclusively in proceedings before the Board. Accordingly for the union to act in their behalf with conclusive effect, authorization by them over and above any authority given by the statute was essential.

III.

Petitioner urges that, apart from the statute, the facts of record show as a matter of law that respondents authorized the Brotherhood to settle the claims, to submit them to the Board, and

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of pay, rules, or working conditions," which were committed exclusively to the collective agent's authority. One important difference preserved the aggrieved employee's rights to participate in all stages of the settlement. Congress therefore, when it preserved those rights, contemplated something more than collective representation and action to make the settlement effective for the past. It follows that the individual employee's rights cannot be nullified merely by agreement between the carrier and the union. They are statutory rights, which he may exercise independently or authorize the union to exercise in his behalf.

to represent them in its proceedings. Respondents deny that authority in any of these respects was given, either by individual authorization or by virtue of the Brotherhood's constitution and rules; and they insist that the record presents these questions as issues of fact.

Stripped of its statutory influences, petitioner's argument comes in substance to this. It is undisputed that from August 27, 1934, to November 23, 1936, when the complaint in Docket No. 3537 was filed, respondents made out time slips and filed many complaints with the carrier's local officials through local officers of the Brotherhood on account of departures from the schedule of Article 6. The question of the article's applicability was a matter of discussion between the Brotherhood and company officials from the time of the transfer in 1934. Respondents admit having authorized the Brotherhood, at a meeting of their local lodge, to file the complaint in Docket No. 3537 and that this complaint was filed in full compliance with the Brotherhood's constitution and rules. The settlement of October, 1938, and the consequent withdrawal of the claim in Docket No. 3537 were made by the same official, Williams, whom respondents had authorized to file the claim and with whom, in effect, both the collective agreement and the Brotherhood's regulations required petitioner to deal concerning the matter.[40] Moreover, the complaint in Docket No. 7324, filed in May, 1939, was filed by Williams and in the same manner as the complaint in Docket No. 3537.

From these facts petitioner concludes that respondents authorized the Brotherhood to settle the claims and to represent them before the Board. In its view, all of these transactions related to the

[40] The collective agreement, of which Article 6 is a part, provides: "Any controversy arising *as to the application* of the rules herein agreed upon . . . shall be taken up . . . " by the general grievance committee with the general superintendent of the carrier, "and in the event of their failure to agree upon a satisfactory settlement, the Committee may appeal to the Vice President." (Emphasis added.) Petitioner says this provision bound it to deal only with the general committee.

Petitioner also relies upon Rule 10 of the Brotherhood's constitution and general rules as imposing the same duty:

"Whatever action may be taken by the General Grievance Committee or Board of Adjustment of any system within the meaning of the above General Rules shall be law to the Lodges on that road until and unless reversed by the Board of Appeals, and if any member refuses to vote or abide by the action of such General Grievance Committee or Board of Adjustment, he shall be expelled from the Brotherhood for violation of obligation."

See also note 8.

same subject matter, namely, whether Article 6 was applicable in the Whiting yard, the only difference being that the relief sought in the two proceedings was not the same; and that difference is not material.

Respondents differ concerning the effect of these facts and others they set forth. They allege that under the Brotherhood's constitution and rules neither Williams and Johnson nor the general grievance committee could "revise or change a general wage 'schedule' or agreement concerning rates of pay, nor working conditions, unless authorized to do so by a majority vote of the lodges, or by a majority vote of the membership in the system"; that claims of individual members for back compensation could not be released without specific authority given individually; that no such authority was given; and that the carrier had knowledge of these limitations. They further allege that Williams and Johnson failed to notify them of the settlement, as the by-laws required;[41] and deny that they knew of the settlement, the proceedings in Docket 7324 or the award until after the award was made, when they promptly repudiated it.[42] They say accordingly that Williams acted without authority from them directly or through the Brotherhood's regulations in submitting and presenting the claims; and that the award is invalid not only for this reason but also because no notice of the proceeding was given to them.

It is apparent that the parties are at odds upon the inferences to be drawn from the facts and their legal effects rather than upon the facts themselves. Respondents deny, and petitioner apparently does not claim, that they at any time individually and specifically authorized the Brotherhood or its officials to compromise their claims for money due or to act for them exclusively in Board proceedings concerning those claims. If there is an issue in this respect it is obviously one of fact concerning which evidence and findings would be required.

The real issues, as we view the record, come down to whether respondents assented, in legal effect, to the final settlement of their

41 This, they say, was because Williams did not regard the agreement as waiving the money claims, since he did not give them the required notice and shortly after the settlement filed the money claims with the Board. Cf. note 6.

42 Respondents also attack the settlement because it was not signed by the third member of the grievance committee, the local grievance chairman. This objection borders on the frivolous.

claims by the union or to exclusive representation by it in any of the following ways: (1) by making complaints through local union officials; (2) by authorizing the Brotherhood to submit the complaint in Docket No. 3537; (3) by virtue of the Brotherhood's regulations; (4) by virtue of the collective agreement.

The collective agreement could not be effective to deprive the employees of their individual rights. Otherwise those rights would be brought within the collective bargaining power by a mere exercise of that power, contrary to the purport and effect of the Act as excepting them from its scope and reserving them to the individuals aggrieved. In view of that reservation the Act clearly does not contemplate that the rights saved may be nullified merely by agreement between the carrier and the union.

Nor can we say as a matter of law that the mere making of complaints through local Brotherhood officials amounted to final authorization to the union to settle the claims or represent the employees before the Board. Neither the statute nor the union's regulations purported to give these effects to that conduct. The time slips apparently were filed by the employees themselves. The record shows only the general fact that complaints concerning departures were made through local officials. More than this would be required to disclose unequivocal intention to surrender the individual's right to participate in the settlement and to give the union final voice in making it together with exclusive power to represent him before the Board. The making of complaints in this manner was only preliminary to negotiation and equivocal at the most.

Nor can we say, in the present state of the record, that the union's regulations unequivocally authorized the general grievance committee or its chairman either to settle the claims or to act as exclusive representative before the Board. The parties rely upon apparently conflicting provisions or, if they are not actually in conflict, then upon different ones, the applicability of some of which is in dispute. Thus respondents rely upon Rule 3, which forbids change in existing agreements without the required vote of local lodges or system membership, and petitioner says the rule is not applicable to the dispute in this case. Whether or not the rule is applicable is a question of fact to be determined in the light of whatever evidence may be presented to sustain the one view or the other. Conceivably it may be intended to apply

only where no grievance is involved or to the settlement of grievances and other disputes as well. But we cannot say, in the absence of further light than is now available, that on its face the rule bears only the one construction or the other.

Similar difficulties arise in connection with the other regulations. Only some of them are set forth in the printed record, although the full constitution and rules were made a part of the record proper by petitioner. The rules and regulations do not purport to require members to negotiate and settle their grievances only through the union. The general committee can act only when a grievance is referred to it by a local lodge. The rules are extensive, parts of them appear to involve possible conflict, the parties differ concerning their effects, and the mode of their operation quite obviously may be largely affected by the manner in which they are applied in practice. Their construction and legal effect are matters of some complexity and should not be undertaken in a vacuum apart from the facts relating to their application in practice. Because both factual and legal inferences would be involved in determining the effects of the regulations to bring about a surrender of the individual rights to take part in the settlement and in the Board's proceedings, those effects cannot be determined as a matter of law in the first instance here.

Nor can we say as a matter of law that authorizing the submission in Docket No. 3537, without more, constituted authorization either to make the agreement of settlement or to represent the employees in Docket No. 7324. The matter requires some explication in the light of the view we have taken concerning the rights of an aggrieved employee in the settlement of grievances. In that view no valid settlement can be made unless he agrees. If settlement by agreement after negotiation fails, he has the right to submit the dispute to the Board for decision. If it is submitted he has rights of notice, hearing and individual representation according to his choice.

All these rights are separate and distinct, though closely related. A surrender or delegation of one would not result in surrender of the others as a matter of law or necessarily as a matter of fact. Whether in particular circumstances it might do so would depend upon whether they were considered sufficient to disclose such an intent.[43] It follows that authority to concur in an agree-

[43] In other words, the aggrieved employee has the right to delegate his power to concur in an agreement of settlement, but at the same time to

ment of settlement does not imply without more authority to represent the employee in Board proceedings, or the latter the former. This is true when the authority is given to the collective agent as it is when it is given to another. That circumstance is not controlling. It only bears as one factor in the total situation. Accordingly in this case the mere fact that the respondents authorized the union to make the submission and to represent them in Docket No. 3537 did not imply authority to make the settlement agreement or to represent them in the quite different later proceedings in Docket No. 7324.

The record does not show conclusively that prior to the submission in Docket No. 3537 the employees had finally committed the whole matter of their claims into the union's hands in such a manner as to constitute a surrender of their individual rights to concur in any agreement of settlement. That conclusion is not justified merely from the fact that the union participated in negotiations with the carrier.

Moreover, the authorization, to act in Docket No. 3537, obviously was given after efforts to secure settlement by negotiation and agreement were considered to have failed. Only then was anyone entitled to make the submission. Accordingly that authorization was entirely consistent with the idea that no further negotiations would be had, and therefore, without more, also with the idea that no authority to negotiate further was implied. It may be that upon a full hearing concerning the course and scope of the negotiations prior to this submission, the evidence will justify a conclusion that the respondents had authorized the union to act finally for them. But the record in its present state does not justify that conclusion as a matter of law.[44]

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reserve his rights to make submission to the Board and of appearance and representation before it, or conversely to reserve his right to concur and delegate the rights of submission and representation. To what extent he may delegate one or all depends therefore upon the intent with which he makes the particular delegation as disclosed by the circumstances in which it is made, or gives evidence of such intent by his conduct, and this will be a question of fact unless the circumstances so clearly show he intended to make the delegation claimed that no other conclusion is possible.

[44] It is true that respondents' position concerning the consequences of their authorization to make the submission in Docket No. 3537 is not altogether consistent. For in claiming that they authorized submission only to determine the applicability of Article 6 for the future, and not to determine the question of retroactivity so as to establish or conclude adversely the basis for their individual monetary claims, they appear to ignore, as does petitioner in some of its contentions, the distinction between collective bargaining

It may be true also that if Docket No. 3537 had been carried to decision the award would have been effective to determine the rights of the parties. But no award was made in that proceeding. It was terminated and the claim was withdrawn. Whether or not that action or other events occurring later were effective to terminate the authority given to submit for the Board's determination the issue which was the foundation of respondents' monetary claims or whether that authority continued in spite of the changed conditions are questions also to be determined from a factual evaluation of the entire situation, essentially preliminary to determination of legal effects, which we cannot make.

Since upon the total situation we cannot say as a matter of law that respondents had authorized the Brotherhood to act for them in Docket No. 7324, whether in submitting the cause or in representing them before the Board; since it is conceded also that they were not given notice of the proceedings otherwise than as the union had knowledge of them; and since further they have denied that they had knowledge of the proceedings and of the award until after it was entered, the question whether the award was effective in any manner to affect their rights must be determined in the further proceedings which are required. The crucial issue in this respect, of course, will be initially whether respondents had authorized the Brotherhood in any legally sufficient manner to represent them, individually, in the Board's proceedings in Docket No. 7324.

Until that question is determined, it is not necessary for us to pass upon the important issue concerning the finality and conclusive effect of the award, or to determine the validity and legal effect of the compromise agreement. We accordingly express no opinion concerning those issues.

The judgment is affirmed. The cause is remanded for further proceedings in conformity with this opinion.

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and the settlement of grievances as the Act defines them. Cf. note 39 and text. If their purpose was merely to authorize settlement for the future, without retroactive effects, the submission to the Adjustment Board was misconceived, since it has no power to render a decision requiring the carrier or the union to make a new agreement. Its only authority, under the Act, is to determine what they have agreed upon previously or, outside the scope of a collective agreement, what rights the carrier and its employees may have acquired by virtue of other incidents of the employment relation. Such an issue by its very nature looks to the past, though it may also seek compliance for the future.

SUPREME COURT OF THE UNITED STATES.

No. 160.—October Term, 1944.

Elgin, Joliet and Eastern Railway Company, Petitioner, *vs.* G. W. Burley, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[June 11, 1945.]

Mr. Justice Frankfurter, dissenting.

On July 27, 1934, the Brotherhood of Railroad Trainmen made an agreement with petitioner, Elgin, Joliet and Eastern Railway Company, affecting its yardmen whereby the starting time for switching crews was fixed. The respondents are employed as switching crews in the Whiting, Indiana yard of petitioner. They are all members of the Brotherhood. Observance by petitioner of this yard agreement was called into question. After abortive conferences for the adjustment of these claims between officials of petitioner and of the Brotherhood, C. H. Williams, General Chairman of the Brotherhood General Grievance Committee, filed a complaint covering several grievances with the National Railroad Adjustment Board, created by the Railway Labor Act of 1934, 48 Stat. 1185, 45 U. S. C. § 151 *et seq.*, to compel petitioner's compliance with the agreed time. In November, 1936, the cases were duly docketed. Before they came to be heard, petitioner, on October 28, 1938, proposed settlement of numerous claims against it by the Brotherhood then pending before the Adjustment Board. Among these claims was the dispute as to starting time. Petitioner agreed for a ninety-day trial period, beginning November 15, 1938, to abide by the time fixed in the 1934 agreement. But its offer was conditioned "on a complete settlement and withdrawal of all cases now pending either before the board, or under discussion with this office . . . and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement." On October 31, 1938, settlement

on these terms was accepted for the yardmen by Williams, General Chairman, and S. F. Johnson, the Secretary of the Brotherhood's General Grievance Committee. On the same day and upon request of the Brotherhood and Railway, the cases were removed from its docket by the Adjustment Board.

Later the Brotherhood filed with the Adjustment Board a second complaint claiming money damages on behalf of its members for violation of the 1934 agreement. The Board, by formal award, denied the claim on the ground that the "evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28th, 1938, accepted by employees October 31, 1938."

Respondents then filed this suit in the District Court for damages. Petitioner invoked the 1938 settlement and the Board's award thereon as a bar, and moved for summary judgment. Respondents resisted this motion by denying the authority of the Brotherhood officials to present their claims to the Board or to agree to the settlement. The District Court gave summary judgment for the petitioner which was reversed by the Circuit Court of Appeals for the Seventh Circuit on the ground that the question of authority of the Brotherhood officials raised an issue of fact for trial by the District Court. 140 F. 2d 488. The correctness of this ruling is the important question now before us. 323 U. S. 690.

We have had recent occasion to consider the Railway Labor Act in other aspects. *Switchmen's Union* v. *Board*, 320 U. S. 297; *General Commitee* v. *M.-K.-T. R. Co.*, 320 U. S. 323; *General Committee* v. *Sou. Pac. Co.*, 320 U. S. 338. The complexities which the problems in those cases laid bare, make clear that the specific question immediately before us cannot be isolated from the scheme and structure of the Railway Labor Act as an entirety. The Act in turn cannot be appreciated apart from the environment out of which it came and the purposes which it was designed to serve.

From the point of view of industrial relations our railroads are largely a thing apart. The nature and history of the industry, the experience with unionization of the roads, the concentration of authority on both sides of the industry in negotiating collective agreements, the intimacy of relationship between the leaders of the two parties shaped by a long course of national, or at least regional, negotiations, the intricate technical aspects of these agree-

ments and the specialized knowledge for which their interpretation and application call, the practical interdependence of seemingly separate collective agreements—these and similar considerations admonish against mutilating the comprehensive and complicated system governing railroad industrial relations by episodic utilization of inapposite judicial remedies.

The Railway Labor Act of 1934 is primarily an instrument of government. As such, the view that is held of the particular world for which the Act was designed will largely guide the direction of judicial interpretation of the Act. The railroad world for which the Railway Labor Act was designed has thus been summarized by one of the most discerning students of railroad labor relations: "The railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making. . . . This state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its component parts, the reign of law has been firmly established." Garrison, The Railroad Adjustment Board: A Unique Administrative Agency (1937) 46 Yale L. J. 567, 568-69.

The Railway Labor Act of 1934 is an expression of that "reign of law" and provides the means for maintaining it. Nearly half a century of experimental legislation lies behind the Act. It is fair to say that every stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions and, to that end, of establishing facilities for such self-adjustment by the railroad community of its own industrial controversies. These were certainly not expected to be solved by ill-adapted judicial interferences, escape from which was indeed one of the driving motives in establishing specialized machinery of mediation and arbitration. Government intervention of any kind was contemplated only as a last resort for the avoidance of calamitous strikes.

The landmarks in this history, tersely summarized, are the meager act of October 1, 1888, 25 Stat. 501, providing for voluntary arbitration; the Erdman Act of June 1, 1898, 30 Stat. 424, securing government mediation and arbitration, but applicable only to those actually engaged in train service operations; the New-

lands Act of July 15, 1913, 38 Stat. 103, providing for a permanent board of mediation and also a board of arbitration; the Adamson Act of September 3, 1916, 39 Stat. 721, as to which see *Wilson* v. *New*, 243 U. S. 332; Order No. 8 of February 21, 1918, formulating the labor policy of the Government after the United States took over the railroads, see Hines, War History of American Railroads (1928) p. 155 *et seq.*; the more elaborate machinery established by Title III of the Transportation Act of 1920, 41 Stat. 456, 469, for adjustments of these controversies, which in its turn was repealed and replaced by the Railway Labor Act of May 20, 1926, 44 Stat. 577, legislation agreed upon between the railroads and the Brotherhoods and probably unique in having been frankly accepted as such by the President and Congress.[1] The actual operation of this legislation partly disappointed the hopes of its sponsors, and led, for the still greater promotion of self-government by the railroad industry, to the Act of 1934.

The assumption as well as the aim of that Act is a process of permanent conference and negotiation between the carriers on the one hand and the employees through their unions on the other. Section 2, First, provides "It shall be the duty of all carriers . . . and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise . . .". Section 2, Second, provides "All disputes between a carrier . . . and its . . . employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier . . . and by the employees thereof interested in the dispute." According to § 2, Sixth, "In case of a dispute . . . arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier . . . and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall

[1] In his message of December 8, 1925, to Congress, President Coolidge stated: "I am informed that the railroad managers and their employees have reached a substantial agreement as to what legislation is necessary to regulate and improve their relationship. Whenever they bring forward such proposals, which seem sufficient also to protect the interests of the public, they should be enacted into law." 67 Cong. Rec. 463.

be held . . .". Section 3, First (i) directs that disuptes growing out of grievances or the interpretation or application of agreements concerning rates of pay, rules, or working conditions be handled by conference and negotiation, including resort if necessary to the chief operating officer of the carrier. Compliance with these statutory duties is a prerequisite to appeal to the National Railroad Adjustment Board. The purpose of this legislation is the exertion of maximum pressure toward amicable settlement between the parties. Resort to the Adjustment Board is the last step in the statutory process.

In the controversy before us an amicable adjustment between the parties—the goal of the legislation—had been achieved by pursuing the course which the Act of 1934 directed. We are now asked to nullify this settlement, arrived at after prolonged negotiations, and to open the door of litigation to new discords. Not only is it sought to revive the dispute and to restore it to the status it had before the Adjustment Board more than eight years ago. The respondents claim that after all these years they have a right to repudiate their bargaining agents and to try the authority of these agents as though this were a conventional lawsuit involving the responsibility of a principal for the conduct of his agent.

As members of their Brotherhood, respondents were of course familiar with the procedure whereby the union speaks for them both to the Railroad and before the Adjustment Board. The Brotherhood's "Constitution and General Rules", which the respondents made part of their case below, are clear about this. Rule No. 7 declares that, after a grievance has been transmitted to a General Grievance Committee, that Committee "shall have power to alter, amend, add to or strike out . . . any part or all of any complaint or claim submitted to the committee, subject to appeal to the entire General Committee and/or Board of Appeals. A general grievance Committee may authorize their chairman to handle all grievances received from local lodges with the management for settlement . . .". Respondents cannot deny that the Brotherhood officials had authority to seek compliance by the railroad with the starting time agreement through the Adjustment Board. In view of the sweeping power of the General Grievance Committee to settle grievances, the settlement that was made on behalf of the Brotherhood is invulnerable. The attack on the settlement because it was signed by only two of the three members

of the Committee is frivolous. Such procedure is not at all unusual. Williams and Johnson settled other grievances in like manner, many of them involving claims for money. The Brotherhood's own rules sanction such action in that the Committee may authorize the Chairman to handle all grievances.

This is not a simple little case about an agent's authority. Demands of the employees' representative imply not only authority from those for whom he speaks but the duty of respect from those to whom he speaks. The carrier is under a legal duty to treat with the union's representative for the purposes of the Railway Labor Act. Section 2, Ninth; see *Virginian Ry.* v. *Federation*, 300 U. S. 515. We do not have the ordinary case where a third person dealing with an ostensible agent must at his peril ascertain the agent's authority. In such a situation a person may protect himself by refusing to deal. Here petitioner has a duty to deal. If petitioner refuses to deal with the officials of the employees' union by challenging their authority, it does so under pain of penalty. If it deals with them on the reasonable belief that the grievance officials of the Brotherhood are acting in accordance with customary union procedure, settlements thus made ought not to be at the hazard of being jettisoned by future litigation. To allow such settlements to be thus set aside is to obstruct the smooth working of the Act. It undermines the confidence so indispensable to adjustment by negotiation, which is the vital object of the Act. See *Division 525, Order of Ry. Conductors of America* v. *Gorman*, 133 F. 2d 273, 278.

But respondents claim that irrespective of the authority of the Brotherhood officials to handle claims for the enforcement of the agreed starting time, Williams did not have authority to present to the Adjustment Board the claim for damages due to respondents for petitioner's alleged past violation of the starting-time agreement. They insist that there is no relation between a claim for money resulting from the violation of a collective agreement and a claim for the enforcement of a collective agreement. But surely this is to sever that which is organic. It wholly disregards the nature of such a collective agreement, its implications and its ramifications. In passing on the claim for money damages arising out of the yard agreement, any tribunal would have to examine, interpret and apply the collective agreement precisely as it would if the issue were the duty to observe the agreement in the future.

An award based on the application of the collective agreement would, quite apart from technical questions of *res judicata*, affect future claims governed by the same collective agreement whatever the particular forms in which the claims may be cast. To find here merely an isolated, narrow question of law as to past liability is to disregard the ties which bind the money controversy to its railroad environment. Such a view is blind to the fact that "all members of the class or craft to which an aggrieved employee belongs have a real and legitimate interest in the dispute. Each of them, at some later time, may be involved in a similar dispute." 40 Ops. Atty. Gen., No. 59 (Dec. 29, 1942) pp. 4-5. Indeed, such a view leaves out of consideration not only the significant bearing of the construction of the same collective agreement on parts of the carrier's lines not immediately before the Court. It overlooks the relation of a provision in a collective agreement with one railroad to comparable provisions of collective agreements with other roads.

To allow the issue of authorization after an award by the Board to be relitigated in the courts is inimical to the internal government of the Brotherhood. Union membership generates complicated relations. Policy counsels against judicial intrusion upon these relations. If resort to courts is at all available, it certainly should not disregard and displace the arrangements which the members of the organization voluntarily establish for their reciprocal interests and by which they bound themselves to be governed. The rights and duties of membership are governed by the rules of the Brotherhood. Rule 10 concerns objections to official action: "Whatever action may be taken by the general grievance committee . . . shall be law to the lodges on that road until the next meeting of the board of appeals, and if any member refuses to vote or abide by the action of such general grievance committee or board of adjustment he shall be expelled from the Brotherhood for violation of obligation". To ask courts to adjudicate the meaning of the Brotherhood rules and customs without preliminary resort to remedial proceedings within the Brotherhood is to encourage influences of disruption within the union instead of fostering these unions as stabilizing forces. Rules of fraternal organizations, with all the customs and assumptions that give them life, cannot be treated as though they were ordinary legal documents of settled meaning. "Freedom of litigation, for instance, is hardly so essential a part of the democratic process that the courts should be

asked to strike down all hindrances to its pursuit. The courts are as wise, to take an example of this, in adhering to the general requirement that all available remedies within the union be exhausted before redress is sought before them as they are unwise in many of the exceptions they have grafted upon this rule." Witmer, Civil Liberties and the Trade Union (1941) 50 Yale L. J. 621, 630. To an increasing extent, courts require dissidents within a union to seek interpretation of the organization's rules and to seek redress for grievances arising out of them before appropriate union tribunals. Compare *Norfolk & W. Ry. Co.* v. *Harris*, 260 Ky. 132; *Agrippino* v. *Perrotti*, 270 Mass. 55; *Snay* v. *Lovely*, 276 Mass. 159; *Webb* v. *Chicago, R. I. & G. Ry. Co.*, 136 S. W. 2d 245.

The Railway Labor Act, as the product of long experience, is a complicated but carefully devised scheme for adjusting the relations between the two powerful groups constituting the railroad industry. It misconceives the legislation and mutilates its provisions to read into it common law notions for the settlement of private rights. If, when a dispute arises over the meaning of a collective agreement, the legally designated railroad bargaining unit cannot negotiate with the carrier without first obtaining the specific authorization of every individual member of the union who may be financially involved in the dispute, it not only weakens the union by encouraging divisive elements. It gravely handicaps the union in its power to bargain responsibly. That is not all. Not to allow the duly elected officers of an accredited union to speak for its membership in accordance with the terms of the internal government of the union and to permit any member of the union to pursue his own interest under a collective agreement undermines the very conception of a collective agreement. It reintroduces the destructive individualism in the relations between the railroads and their workers which it was the very purpose of the Railway Labor Act to eliminate. To allow every individual worker to base individual claims on his private notions of the scope and meaning of a collective agreement intended to lay down uniform standards for all those covered by the collective agreement, is to permit juries and courts to make varying findings and give varying constructions to an agreement inevitably couched in words or phrases reflecting the habits, usage and understanding of the railroad industry. Thus will be introduced those dislocating

differentiations for workers in the same craft which have always been among the most fertile provocations to friction, strife, and strike in the railroad world. The Railway Labor Act, one had supposed, would be construed so as to reduce and not to multiply these seeds of strife.

In order to avoid mischievous opportunities for the assertion of individual claims by shippers as against the common interest of uniformity in construing railroad tariffs, this Court so construed the Interstate Commerce Act in the famous *Abilene Cotton Oil* case, 204 U. S. 426, as to withdraw from the shipper the historic common law right to sue [redacted] in the courts. It required resort to the Interstate Commerce Commission because not to do so would result in the impairment of the general purpose of that Act. It did so because even though theoretically this Court could ultimately review such adjudications imbedded in the various judicial judgments—if a shipper could go to a court in the first instance—there would be considerations of fact which this Court could not possibly disentangle so as to secure the necessary uniformity. The beneficent rule in the *Abilene Cotton Oil* case was evolved by reading the Interstate Commerce Act not as though it were a collection of abstract words, but by treating it as an instrument of government growing out of long experience with certain evils and addressed to their correction. Chief Justice White's opinion in that case was characterized by his successor, Chief Justice Taft, as a "conspicuous instance of his unusual and remarkable power and facility in statesmanlike interpretation of statute law." 257 U. S. xxv. The provisions of the Railway Labor Act do not even necessitate such a creative act of adjudication as this Court in the *Abilene* case unanimously accomplished. The Railway Labor Act contains no embarrassing specific provision, as was true of § 22 of the Interstate Commerce Act, 24 Stat. 379, 387, calling for subordination to the main purpose of the legislation. The considerations making for harmonious adjustment of railroad industrial relations through the machinery designed by Congress in the Railway Labor Act are disregarded by allowing that machinery to be by-passed and by introducing dislocating differentiations through individual resort to the courts in the application of a collective agreement.

Since the claim before the Adjustment Board was for money, there remains the question whether its disposition was open to ju-

dicial review. The Railway Labor Act commands that the Board's "awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." Section 3, First (m). But the determination here in controversy does not "contain a money award" so as to be excepted from the final and binding effect given other awards. The obvious meaning of "money award" is an award directing the payment of money, not one denying payment. See *Berryman* v. *Pullman Co.*, 48 F. Supp. 542. We are pointed to no aids to construction that should withhold us from giving the familiar term "money award" any other than its ordinary meaning as something that awards money. This construction is confirmed by comparison with the provisions of the Interstate Commerce Act dealing with reparation orders. Since both Acts came out of the same Congressional Committees one finds, naturally enough, that the provisions for enforcement and review of the Adjustment Board's awards were based on those for reparation orders by the Interstate Commerce Commission. Compare Railway Labor Act, § 3, First (p) with Interstate Commerce Act, as amended by § 5 of the Hepburn Act, 34 Stat. 584, 590, 49 U. S. C. § 16(1), (2). If a carrier fails to comply with a reparation order, as is true of non-compliance with an Adjustment Board award, the complainant may sue in court for enforcement; the Commission's order and findings and evidence then become *prima facie* evidence of the facts stated. But a denial of a money claim by the Interstate Commerce Commission bars the door to redress in the courts. *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448; *I. C. C.* v. *United States*, 289 U. S. 385, 388; *Terminal Warehouse* v. *Penn. R. Co.*, 297 U. S. 500, 507.

The Railway Labor Act precludes review of the Board's award; and, since authorization of the Brotherhood officials to make the settlement is not now open to judicial inquiry, the judgment calls for reversal.

The Chief Justice, Mr. Justice Roberts and Mr. Justice Jackson join in this dissent.